

THE  
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**TCPA Case Law Review (Vol. 4)**

Wednesday, August 29, 2018

This is the fourth part in a series. For further reading, see "[ACA v. FCC Close to a Slam Dunk for TCPA Defendants](#)," "[TCPA Case Law Update \(Vol. 2\)](#)," and "[TCPA Case Law Update \(Vol. 3\)](#)."

If you have seen members of the TCPA plaintiffs' bar sweating a bit more than usual lately, it's not just the summer heat—they're probably concerned about the steady stream of positive cases for the defense bar over the past month. Since our last update, a considerable number of new TCPA decisions have come out, including several circuit level decisions. And while not every case discussed in this edition of the TCPA Case Law Review went the way of the defendants, a clear tendency this summer is for courts to rule against TCPA class action plaintiffs. Let's hope this is one trend that continues after Labor Day.

As always, we will continue to keep you apprised of developments going forward. The decisions are listed by issue category in alphabetical order.

- **Agency:** The Seventh Circuit affirmed summary judgment for the defendant in a TCPA fax case where the plaintiff could not demonstrate the defendant's knowledge or involvement in the fax campaign because "[n]othing in the statute allows the imposition of liability on an entity wholly unaware of the use of its logo in a fax." *Helping Hand Caregivers, Ltd. v. Darden Rests., Inc.*, 2018 U.S. App. LEXIS 22490, \*13-\*14 (7th Cir. Aug. 14, 2018); *but see Compressor Eng'g Corp. v. Mfrs. Fin. Corp.*, 2018 U.S. App. LEXIS 22812, \*1 (6th Cir. Aug. 16, 2018) (reversing summary judgment for the defendant and holding that, taking all evidence in the light most favorable to plaintiff, a reasonable juror could have concluded that defendant edited the fax ads, approved the final drafts and paid for them).
- **ATDS:** In *Keyes v. Ocwen Loan Servicing, LLC*, 2018 U.S. Dist. LEXIS 138445 (E.D. Mich. Aug. 16, 2018), the Court granted partial summary judgment for the defendant, finding that the defendant's system was not an ATDS. The court held that, based on the D.C. Circuit's decision in *ACA International*, it was not required to defer to the FCC's definition of an ATDS on the "capacity" issue. at \*18. The court found as a matter of law that the system was not an ATDS because "simply calling from a set list is not enough for equipment to constitute an autodialer." *Id.* at \*23. Also notable—the court excluded the testimony of popular TCPA plaintiffs' expert Jeffrey Hansen. *Id.* at \*13-\*14. See also *Ramos v. Hopele of Fort Lauderdale, LLC*, 2018 U.S. Dist. LEXIS 139947 (S.D. Fla. Aug. 16, 2018) (analyzing the *ACA International* decision and finding that defendant's system was not an ATDS); *Lord v. Kisling, Nestico & Redick, LLC*, 2018 U.S. Dist. LEXIS 116288 (N.D. Ohio July 12, 2018) (granting motion to dismiss where complaint merely parroted ATDS allegations).
- **Class certification:** In *KHS Corp. v. Singer Fin. Corp.*, 2018 U.S. Dist. LEXIS 143337, \*11 (E.D. Pa. Aug. 23, 2018), the court denied class certification in a TCPA case where "common questions will not predominate leading to the potential for thousands of mini-trials on the individualized issue of consent." See also *America's Health & Res. Ctr., Ltd. v. Promologics, Inc.*, 2018 U.S. Dist. LEXIS 120590 (N.D. Ill. July 19, 2018) (granting in part a motion to strike class allegations).
- **Personal jurisdiction:** A court in the District of Connecticut found that it lacked personal jurisdiction over the defendant in a TCPA case where the plaintiff failed to adequately plead general or specific personal jurisdiction. *Kaye v. MD TLC, Inc.*, 2018 U.S. Dist. LEXIS 121226, \*15-\*16 (D. Conn. July 20, 2018).
- **Settlement approval:** The Seventh Circuit affirmed the district court's award of approximately \$73,000

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in attorneys' fees in connection with a TCPA settlement, despite the requested fee of \$233,333. See *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 2018 U.S. App. LEXIS 20928, \*18 (7th Cir. July 27, 2018)

- **Standing:** The Eighth Circuit held that there was no Article III standing when the plaintiff “both invited and did not rebuke” the challenged faxes. *Louis Heart Ctr., Inc. v. Nomax, Inc.*, 2018 U.S. App. LEXIS 21662, \*7 (8th Cir. Aug. 6, 2018).
- **Solicited fax rule:** In an order affirming, in part, a district court’s denial of class certification, the Ninth Circuit agreed with the Sixth Circuit that it was bound by the D.C. Circuit’s invalidation of the Solicited Fax Rule in *Bais Yaakov of Spring Valley v. FCC*. See *True Health Chiropractic, Inc. v. McKesson Corp.*, 2018 U.S. App. LEXIS 19641, \*13 (9th Cir. July 17, 2018).

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