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Your TCPA Settlements Can't and Won't Be Used Against You in a Court of Law (Probably)

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TCPA Plaintiffs often utilize overly broad discovery demands in an effort to bludgeon a caller into settling an otherwise meritless case.

One of the most common tactics is serving boilerplate demands seeking a Defendant's entire TCPA litigation history, including all TCPA settlements that Defendant may have been a part of. Responding to these sorts of demands can be difficult and costly—especially for large institutional defendants that may not have a centralized litigation database tracking all demands/settlements of any particular sort. But these demands are not designed to seek relevant or admissible evidence anyway; unlitigated hearsay claims of third-parties are certainly not evidence that the specific caller violated the TCPA with respect to a specific Plaintiff who is unrelated to those previous claims.

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In *Celestine v. JP Morgan Chase Bank, N.A.*, No. 1:17-cv-20915-KMM, 2018 U.S. Dist. LEXIS 79685 (S.D. Fla. May 11, 2018) Chief Judge Moore of the Southern District of Florida granted summary judgment to a Defendant on the ground that Plaintiff's evidence of encountering a "long pause" before someone began speaking was insufficient to raise a triable issue as to whether or not the Defendant had used an ATDS to make the challenged calls. While this holding is useful enough—the Court found that Defendant's declarations to the effect that the calls were placed "manually" were sufficient to shift the burden to Plaintiff on the ATDS issue—there are a number of similar decisions out there.

The really interesting part of *Celestine* is the Court's rejection of Plaintiff's argument that Chase's past TCPA settlements could be used as evidence that Chase used an ATDS to call him. Chase would not have settled those cases–the argument goes–unless it used an ATDS. But that's a bad argument and the Court swiftly rejected it holding that "Plaintiff cannot point to those previous cases as evidence that Defendant violated the TCPA." Surprisingly, however, the Court based that portion of its holding on F.R.E. 408(a), which governs the confidential nature of settlement communications between parties to an action, rather than upon the broader rule of relevance (or irrelevance) of evidence regarding third party TCPA claims.

No matter what the basis for the ruling, however, *Celestine* serves as another reminder that past litigation history is simply off limits in TCPA cases.

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