

THE
NATIONAL LAW REVIEW

TCPA Case Law Update (Vol. 2)

Wednesday, June 6, 2018

In case there was any doubt that TCPA cases continue to flood federal court dockets nationwide, we recently reviewed the **nearly 300 decisions** referencing the TCPA that have been published since mid-December. Some of them have obviously made big headlines, like [ACA v. FCC](#) or the [dueling interpretations](#) of the ACA decision in *Reyes v. BCA Fin. Servs.* and *Herrick v. GoDaddy.com, LLC*. But many lesser-known decisions also could prove useful in defending TCPA cases. The decisions are listed by issue category in alphabetical order.

- **Agency:** The court affirmed summary judgment for the defendant on agency grounds, holding that “[i]n determining whether vicarious liability may be imposed, the ‘extent of control exercised by the [principal]’ is the ‘essential ingredient.’” *Jones v. Royal Admin. Servs.*, 887 F.3d 443 (9th Cir. 2018)
- **ATDS:** The court granted partial summary judgment for the defendant on the ATDS issue based on its interpretation of ACA and a rejection of legal conclusions made by popular TCPA plaintiff’s expert Randall Snyder. *Marshall v. CBE Grp., Inc.*, 2018 U.S. Dist. LEXIS 55223 (D. Nev. March 30, 2018). Similarly, another court relied on ACA to grant summary judgment for a defendant on a TCPA claim because the court found that the equipment at issue was not an ATDS. *Maddox v. CBE Group*, 2018 U.S. Dist. LEXIS 88568 (N.D. Ga. May 22, 2018). Even before ACA, another court granted summary judgment to the defendant based on a conclusion that the system at issue was not an ATDS. *Ferrer v. Bayview Loan Servicing, LLC*, 2018 U.S. Dist. LEXIS 12600 (S.D. Fla. Jan. 26, 2018).
- **Class certification:** The court denied class certification in a TCPA fax case based on individual issues predominating over classwide issues. *Gorss Motels, Inc. v. Safemark Sys., L.P.*, 2018 U.S. Dist. LEXIS 58111 (M.D. Fla. April 5, 2018). In another case, the court granted class certification in part, but declined to define the class to include individuals outside the state of Illinois based on personal jurisdiction concerns and the Supreme Court’s decision in *Bristol-Meyers. Practice Mgmt. Support Servs. v. Cirque Du Soleil, Inc.*, 2018 U.S. Dist. LEXIS 39754 (N.D. Ill. March 12, 2018). A third court granted a motion to strike class allegations (without prejudice) where the class definition was inconsistent with the claims asserted by the plaintiff. *A Custom Heating & Air Conditioning, Inc. v. Kabbage, Inc.*, 2018 U.S. Dist. LEXIS 8975 (N.D. Ill. Jan. 18, 2018).
- **Consent:** The court affirmed summary judgment for the defendant when the plaintiff consented to be contacted regarding surveys at the time of program enrollment. *Fober v. Mgmt. & Tech. Consultants, LLC*, 886 F.3d 789 (9th Cir. 2018). Another court dismissed a TCPA claim where the plaintiff failed to adequately allege revocation of consent. *Rando v. Edible Arrangements Int’l, LLC*, 2018 U.S. Dist. LEXIS 51201 (D.N.J. March 28, 2018).
- **Constitutionality:** The court denied a motion under Rule 12(c) related to the constitutionality of the TCPA as amended by the Bipartisan Budget Act of 2015, but signaled that the issue is open to debate by certifying the issue for immediate interlocutory appeal. *Gallion v. Charter Communs., Inc.*, 287 F. Supp. 3d 920 (C.D. Cal. Feb. 26, 2018)
- **Healthcare exception:** The court ruled in favor of the defendant based on the fact that the messages at issue were “health care messages” and therefore exempt from the written consent requirements of the TCPA. *Zani v. Rite Aid Hdqtrs. Corp.*, 2018 U.S. App. LEXIS 4354 (2nd Cir. Feb. 21, 2018).
- **Mootness:** The court dismissed a plaintiff’s claim as moot where defendant tendered the full amount of



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the plaintiff's claim via check. *Kaplan v. Fulton St. Brewery, LLC*, 2018 U.S. Dist. LEXIS 79961 (D. Mass. May 11, 2018).

- **Standing:** The court dismissed a TCPA claim for lack of standing where the plaintiff received two text messages — one that was not an advertisement and the other that she had consented to receive. *Reese v. Marketron Broad. Sols., Inc.*, 2018 U.S. Dist. LEXIS 77319 (E.D. La. May 8, 2018). Similarly, a court found that the plaintiff lacked Article III standing when the plaintiff had a specific protocol set up to collect faxes for the purposes of pursuing TCPA claims and no one employed by the plaintiff recalled actually receiving the fax. *Voc. Schs. of Pittsburgh, Inc. v. Mildon Bus Lines, Inc.*, 2018 U.S. Dist. LEXIS 21679 (W.D. Pa. Feb. 9, 2018).
- **Telemarketing:** The court granted summary judgment in favor of the defendant, holding that a text message sent in response to an advertisement offering a vehicle for sale was not a telemarketing message. *Edelsberg v. Vroom, Inc.*, 2018 U.S. Dist. LEXIS 50420 (S.D. Fla. March 27, 2018). Another court determined that a defendant was not a telemarketer for the purposes of the TCPA when it made a call with the intent of buying, rather than selling, something. *Knutson v. Blue Light Sec., Inc.*, 2018 U.S. Dist. LEXIS 36745 (S.D. Cal. March 6, 2018).

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