

TCPA Case Law Review (Vol. 3)

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

The TCPA continues to generate significant case law nationwide. Since our last published update on June 5, 2018, there have been several significant decisions that all TCPA defense practitioners should be aware of. As always, we will continue to keep you apprised of developments going forward. The decisions are listed by issue category in alphabetical order.

- **ATDS:** A federal circuit court vacated a summary judgment ruling in favor of the plaintiff and remanded the case for further consideration, based on the notion that the "capacity" language in the definition of an ATDS was best understood to refer to the functions a device was currently able to perform, rather than to functions that it would have the ability to perform after modifications. *King v. Time Warner Cable Inc.*, 2018 U.S. App. LEXIS 17880, *1 (2nd Cir. June 29, 2018). Similarly, another circuit court affirmed an entry of summary judgment for the defendant because the plaintiff could not point to any evidence that created a genuine dispute of fact as to whether the system at issue had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers. *Dominguez v. Yahoo, Inc.*, 2018 U.S. App. LEXIS 17436, *1 (3rd Cir. June 26, 2018).
- **Class certification:** The court denied class certification in a TCPA fax case

because it found that the class was not ascertainable. *Career Counseling, Inc. v. Amsterdam Printing & Litho, Inc.*, 2018 U.S. Dist. LEXIS 110925, *18 (D.S.C. July 3, 2018). Similarly, the court reaffirmed its denial of class certification as to a subclass directed at the FCC's so-called "Solicited Fax Rule" because it elected to follow the D.C. Circuit's decision overturning that rule. *Bais Yaakov of Spring Valley v. Educ. Testing Serv.*, 2018 U.S. Dist. LEXIS 96161, *16 (S.D.N.Y. June 6, 2018).

- **Personal jurisdiction:** The court granted the defendant's motion to dismiss a TCPA text message case for lack of personal jurisdiction because the plaintiff could not establish that the defendant (based in South Carolina) specifically targeted the state of Minnesota just because it sent text messages to phone numbers with Minnesota area codes. *Frank v. Gold's Gym of N. Augusta*, 2018 U.S. Dist. LEXIS 108231, *7 (D. Minn. June 28, 2018).
- **Settlement approval:** The court denied, without prejudice, final approval of a class action settlement that would have awarded plaintiffs' counsel \$390,000 in attorneys' fees where the claims from the class had only totaled \$27,430. *Marengo v. Miami Research Assocs., LLC*, 2018 U.S. Dist. LEXIS 95908, *10-11 (S.D. Fla. June 7, 2018).

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