TCPA Tracker - December 2022

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RECENT NEWS

FCC Cracks Down on Student-Loan Scams: Orders Voice Service Providers to Stop Carrying Robocalls from "Student Loan Robocall Operation"

On December 8, 2022, the FCC ordered all voice service providers to terminate customer relationships or block traffic from illegal student-loan related scam robocalls. The "Student Loan Robocall Operation," consisting of Urth Access LLC, Fire Data LLC, US Acquisitions LLC, Dawood & Dawood, Dawood and Company, their individual associates, and associated entities, was found to be responsible for millions of such calls. The Order warned that "if any voice service provider, after investigation of the suspected illegal robocall traffic identified in this Order, thereafter does NOT terminate a customer relationship or block the traffic, it will be required to provide a written report to the Bureau with the results of its investigation[.]"

The Order comes in response to an uptick in robocall scams regarding student loan payments following President Biden's initial loan-forgiveness announcement on August 24, 2022. The Student Loan Robocall Operation "did not receive adequate consent of the called parties for its robocalls," in violation of the TCPA. Some of the robocalls contained the following message:

"Hello this is to inform you that the Student Loan payment suspension has been extended to December 31 of this year. Also, everyone is now going to get $10,000 dismissed upon income verification. If you do not verify your income, on January 1, your payments will start back up automatically. To receive the full dismissal, not just the $10,000 dismissal, a petition will be filed in your behalf so that your loan payments do not begin on January 1. If you're being serviced by Nelnet, Navient, Fed loans or Great Lakes, please press 5 on your phone now. If your servicer was not listed, you can also receive a dismissal by pressing 5. If you have verified your income and received your partial or full dismissal already, please press 9 to stop your notifications. Thank you."

The FCC's Enforcement Bureau identified Urth Access as the origin of most of the robocall campaigns and sent Urth Access a subpoena for additional information and a cease-and-desist letter, neither of which received a response.. While "Consent logs" that Urth Access provided included websites that allegedly captured the parties' consent, these sites referred to health insurance products and services, not student loans.

The Enforcement Bureau also issued a Public Notice on November 10 to notify downstream service providers that they may block voice calls or cease to accept traffic from Urth Access without liability.

The Notice stated that an Order would follow if Urth Access failed to comply with the cease-and-desist letter. When Urth Access did fail to comply, this Order was issued. Voice providers are now to "investigate promptly the apparently illegal robocall traffic," and take "immediate steps to effectively mitigate and prevent further transmission of the apparently unlawful calls."
The full text of the FCC's order can be found here.

In the Matter of Urth Access, LLC

CASES OF NOTE

First Circuit Rejects $14 Million Settlement Agreement that Treats Differently-Situated Class Members Equally

On December 16, 2022, the First Circuit vacated approval of a $14 million TCPA class settlement involving HelloFresh and three separate classes because it was "difficult" to determine whether the settlement treated class members equitably in light of the absence of separate counsel for each class. The Court cited concern over the potential for inequity between differently situated members of the class action: those who claim to have received unauthorized autodialed marketing calls, those listed on the National Do-Not Call registry, and those who asked HelloFresh not to call again, but subsequently received telemarketing calls.

HelloFresh, a subscription service that delivers recipes and ingredients to the doorsteps of its customers, launched a 'win back' marketing campaign in 2015. This campaign included using contractors to contact former subscribers. Plaintiffs alleged that the campaign violated the TCPA by (1) "using an automated dialer to place marketing calls," (2) calling people listed on the National Do-Not-Call registry ("NDNC"), and (3) "calling some people who had requested that HelloFresh not call them (and therefore were required to be on HelloFresh's federally mandated internal do-not-call (IDNC) list)."

Following the commencement of litigation, the parties engaged in settlement discussions in which plaintiffs' counsel acted jointly "on behalf of all prospective class members possessing one or more of three potential claims arising out of HelloFresh's 'win back' campaign."

For the purposes of the proposed settlement only, the district court "certified a single class, with no subclasses, consisting of about 4.8 million customers and former customers," with about 100,000 submitting valid claims. Under the proposed settlement, after fees were accounted for, each class member who submitted a valid claim "would receive about $89."

Three individuals filed objections. One, Sarah McDonald, argued that "no single lawyer or group of lawyers could adequately negotiate and recommend a settlement jointly on behalf of three subgroups having materially different claims." The settlement, McDonald argued, "sold out class members who were on the NDNC registry – whose claims she says are the most valuable – by placing them on equal footing with members in the other two groups, whose claims she says are virtually worthless."

After hearing these objections, and requiring HelloFresh to remove a clause compelling arbitration from the settlement, the district court approved the settlement, and McDonald appealed.

The First Circuit agreed with McDonald's inequity argument. The Court found that the "structural assurance" that a negotiated agreement accounts for any differences in claims between parties "is absent when a single lawyer represents groups with significantly different claims."

The court ultimately found that the class as certified consisted of class members with claims arising from three different sections of the TCPA, requiring different elements and facing different defenses. While the Court rejected McDonald's other claim that incentive payments for named class members are unfair, ruling that incentive payments for named class members were permissible, it nonetheless vacated the approval of the proposed settlement.

Murray et al. v. Grocery Delivery E-Services USA Inc., No. 21-1931, 2022 WL 17729360 (1st Cir 2022).

Facebook "Birthday Announcement" Texts Are Not a TCPA Violation: Ninth Circuit Finds Again that an 'Autodialer' Must "Generate and Dial" Phone Number

On December 21, 2022, The Ninth Circuit affirmed dismissal of Colin Brickman's class action against Meta Platforms, Inc. Brickman argued that Meta violated the TCPA by sending unsolicited "Birthday Announcement" text messages to consumers' cell phones, because these texts were alleged to be sent by Meta through an autodialer that used a random or sequential number generator ("RSNG"). Brickman did not argue that the RSNG generated the phone numbers, but that it was used to determine the order in which the phone numbers were stored and dialed. Meta argued that such usage does not violate the TCPA. Accordingly, the question on appeal was whether a TCPA-defined autodialer must use an RSNG to generate the telephone numbers that are dialed.

The Court noted that this question was answered before by the Ninth Circuit, in November 2022, in *Borden v. EFinancial LLC* (discussed here), which held that under the TCPA's plain text, an autodialer "must generate and dial random or sequential telephone numbers." The majority of the panel agreed with the analysis in *Borden*, but noted that regardless of whether they agreed, they could not disregard an "earlier published decision of this circuit that is directly on point." The Court therefore found that Meta did not violate the TCPA because it did not use a TCPA-defined autodialer to generate the phone numbers in question.
Brickman v. Meta Platforms, Inc., No. 21-16785 (9th Cir. 2022)

Washington District Court Grants Class Certification for Class Suing for Alleged Avatar and IVR Use

On December 23, the Western District Court of Washington granted in part Plaintiffs' renewed motion for class certification. Defendant PillPack LLC is a pharmacy that delivers medications in multi-dose packaging to patients' homes. Defendant hired Performance Media to generate live customer leads and transfer those leads to Defendant's call center. Defendant was purportedly informed that the calls "would be placed using a prerecorded voice system which is sometimes described as an Avatar[1] or IVR (interactive voice response)," and that a third party, Prospects DM, would place the calls at-issue.

The Court rejected Defendant's arguments that individual issues with regard to "(1) consent; (2) prerecorded voice; (3) whether each call was inbound or outbound; (4) vicarious liability; and (5) identification of the person having exclusive use and control of each phone number," precluded class certification. In doing so, the Court noted that the Ninth Circuit's decision in *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, permitted "a court to certify a class with more than a de minimis number of uninjured class members." In addressing Defendant's arguments, the Court notably stated that although there may be "some consumers in the class that did provide prior

express consent[,]... the Court may still exclude these individuals from the class later" without individual questions predominating for class certification purposes. Similarly, the Court stated that Defendant can "contest liability as to specific class members" at trial.

The Court also rejected Defendant's contention that the question of whether Defendant is a "seller" for TCPA purposes requires individual inquiry. The Court noted that this inquiry, as well as "whether avatar calls constitute pre-recorded calls under the TCPA," will likely drive the litigation, and are susceptible to common evidence.
Williams v. PillPack, LLC ____ F.R.D. ____, 2022 WL 17904232 (W.D. Wash. Dec. 23, 2022)

Court Denies Class Certification Due to Class Representative's Atypicality and Inadequacy

In a TCPA suit brought in the Northern District of California over calls to Plaintiff's phone number, which was registered on the national Do-Not-Call registry, the Court granted defendant's motion to deny class certification because Plaintiff's use of her phone for business purposes. Plaintiff sought to represent herself and a putative class of all persons whose numbers were on the Do-Not-Call registry who received more than one telemarketing call from Defendant within a twelve-month period for a similar purpose to that for which Defendant called Plaintiff.

However, the Court held that Plaintiff, in order to maintain a claim on behalf of a class, had to prove that she was a "resident telephone subscriber who registered her telephone number on the national do-not-call registry." The record established that Plaintiff used her personal cell phone for business purposes, which raised a "unique defense" that "render[ed] her claim atypical under" the Federal Rules of Civil Procedure. Because the use of her personal phone for business purposes could support a potential defense, the Court ruled it was a triable issue of fact that made Plaintiff's injuries atypical from the class she sought to represent. The Ninth Circuit recently examined the impact of cell phones used for both personal and business purposes on the application of the TCPA here.

The Court also found issues with the "honesty and credibility" of Plaintiff as a class representative, citing multiple contradictions in Plaintiff's testimony pertaining to whether and to what extent she used her personal cell phone for personal and/or business purposes. Included in these contradictions were differences between deposition testimony, assertions in briefings, statements in televised interviews, and interrogatory answers. Because there were inconsistencies regarding Plaintiff's use of her personal phone number for business, which was an issue "central to the litigation," the court held that Plaintiff would be unable to "vigorously prosecute [the] case on behalf of the rest of the class" and denied class action certification.

Trim v. Mayvenn, Inc., No. 20-CV-03917-MMC, 2022 WL 17584237 (N.D. Cal. Dec. 12, 2022)

Informative Fact not an Illegal "Advertisement" Under the TCPA

The Eighth Circuit recently affirmed a grant of summary judgment for Defendant Caremark, a pharmacy benefits manager that administers a pharmacy network whereby various insurance policyholders may fill their prescriptions. In October 2019, Caremark implemented new opioid coverage-limitation options for its clients to institute, including a three-day supply limit for patients under the age of twenty. Upon introducing this option, Caremark, through a third party, sent a fax to announce the supply limitation to more than 55,000 healthcare providers who had previously prescribed opioids to adolescent patients, including Plaintiff BPP. The fax contained an explanation of

the supply limit policy that Caremark's clients had the option of introducing and an outline of the policy's terms. BPP sued Caremark under the TCPA alleging that the fax was an "unsolicited advertisement." The District Court and the Eighth Circuit disagreed.

First, the Eighth Circuit noted that the TCPA does not ban all faxes that contain information about commercial goods or services, just faxes that "advertis[e] the commercial availability or quality of any property, goods, or services. The fax itself, and not just the underlying [good or service] must have a commercial component." Thus, the Court concluded, in order to be an "advertisement" under the TCPA, the fax must have "profit as its aim." Here, the fax was merely informational, and not aimed at making a profit.

Finally, the Eighth Circuit held there was no genuine dispute of material fact as to whether the Caremark fax was "promot[ing] the sale of its [] services or prescription drugs" because the "language of the fax and the nature of Caremark's business" demonstrated that the fax merely informed healthcare providers about a limitation option on opioid prescriptions. Caremark does not itself sell any prescription drugs, and therefore, the Court found, it could not have intended its fax to induce doctors to pay for their goods or services. Finding that "no reasonable jury could find that the fax was an 'unsolicited advertisement' under the TCPA," the Eighth Circuit affirmed a grant of summary judgment for Defendant Caremark.

BPP v. CaremarkPCS Health, L.L.C., 53 F.4th 1109 (8th Cir. 2022)

Court Dismisses Barebones TCPA Claim

The Northern District of Ohio recently dismissed a TCPA claim brought against a mortgage company for alleged calls made to the Plaintiff's number, which was on the national Do-Not-Call registry, involving "artificial pre-recorded voices," or a "perceptible delay" in connecting Plaintiff to a real person. The Court found that the complaint failed to plausibly allege that Defendant used an Automatic Telephone Dialing System ("ATDS") or artificial or prerecorded voice. The complaint also failed to allege that Defendant called Plaintiff more than once within a twelve-month timeframe, or that such calls were "solicitations," as required to state a claim under the TCPA.

First, the Court found that Plaintiff failed to plead "enough additional, independent facts" to "give[] fair notice to defendants by distinguishing th[is] particular case . . . from every other hypothetically possible case under TCPA." Plaintiff attempted to allege that Defendant used an ATDS "as evidenced by the perceptible delay and manner in which the Plaintiff's information [was] transferred between the lead generator and the party the Plaintiff is transferred to" and by "some of the calls having delivered artificial pre-recorded voice messages." The Court, however, found that because the Plaintiff "merely parroted the language of the statute" and did not "include a description of the content of the calls or information regarding the frequency of the calls," his allegations amounted to "bare assertion[s]." Without any "details regarding the alleged delays . . . or any description of the manner by which the calls were transferred," the allegations were "insufficient to state a claim."

Next, the Court held that the Plaintiff failed to allege the frequency of the Defendant's calls with requisite specificity. To state a claim under the TCPA, a plaintiff must allege that the defendant called him more than once within a twelve-month period. Here, Plaintiff failed to identify how many times Defendant called him in any given year. The complaint merely alleged that Defendant "collectively made multiple calls per week, beginning in 2019 and continuing into 2022." The Court found that by using the term "collectively," the Plaintiff grouped the calls from 2019 through 2022 together and, by doing so, failed to specify the number of calls that allegedly took place each year.

Further, the Court found that Plaintiff also failed to allege that the Defendant's calls were illegal "solicitations" as the complaint was devoid of factual allegations as to the "nature of any call, i.e. the goods or services being solicited" and allegations regarding "any benefits Defendant received from Plaintiff as a result of any alleged call." Because the Plaintiff failed to set out in adequate specificity the Defendant's alleged infractions of the TCPA, the Court dismissed Plaintiff's complaint.
Katz v. CrossCountry Mortg., LLC, No. 1:22-CV-00925, 2022 WL 16950481 (N.D. Ohio Nov. 15, 2022)

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[1] Avatar calls are calls made using Artificial Intelligence to create an 'interactive' call.