

TCPA Tracker: February-March 2025

April 28, 2025

FCC Delays Effective Date for New TCPA Consent Revocation Rule

The FCC announced on April 7, 2025, that it was issuing a one-year delay on its latest TCPA implementing rule governing consent revocation, Section 64.1200(a)(10), just days before it was set to take effect on April 11. The rule and the FCC's decision to postpone its effective date are described more fully in Kelley Drye's [AdLaw News and Views](#).

Seventh Circuit Finds TCPA Claims Fall Short of Statute's "Telephone Solicitation" Definition, Affirming Summary Judgment Dismissal

The Seventh Circuit affirmed the Eastern District of Wisconsin's summary judgment dismissal of a Plaintiff's TCPA claims, finding that the calls and text messages Plaintiff allegedly received were not initiated for the purpose of encouraging Plaintiff to make a purchase, and therefore, did not fall within the meaning of "telephone solicitations" under the TCPA.

Plaintiff alleged that he received around 20 calls and text messages from Zipongo Inc, doing business as Foodsmart, despite being listed on the National Do-Not-Call Registry. Foodsmart, a company focused on providing one-on-one nutritional consultations, contracts with various healthcare plans, including Plaintiff's state- and Medicaid-funded healthcare plan. Accordingly, the at-issue calls and texts informed Plaintiff that he could utilize certain Foodsmart's services for free, with any cost billed to his healthcare provider.

Plaintiff filed a putative class action suit in the Eastern District of Wisconsin alleging that Foodsmart violated 47 C.F.R. § 64.1200(c)(2), (d), and (e) of the TCPA and FCC's implementing regulations by initiating "telephone solicitations" while ignoring both Plaintiff's status on the Do-Not-Call registry, and his repeated requests for the calls and texts to stop.

Foodsmart moved for summary judgment, arguing that because the purported calls and text messages were meant to provide Plaintiff with information about a free service, alleged communications did not encourage the purchase of a good, service, or property, and as such, could not be considered "solicitations" under the TCPA. In response, Plaintiff claimed that the alleged calls and text messages were in fact initiated for the purpose of encouraging Plaintiff to purchase Foodsmart's services, especially given that Plaintiff's health insurer would have paid for the services if Plaintiff had accepted them. The Eastern District of Wisconsin granted Foodsmart's motion and Plaintiff appealed.

The Seventh Circuit agreed with the district court that Foodsmart's calls and text messages did not qualify as "telephone solicitations" under the TCPA because they were not initiated for the purpose of encouraging Plaintiff to make a purchase from Foodsmart. Writing for the majority, Judge St. Eve explained that the purpose of Foodsmart's communications was to encourage individuals, like Plaintiff, to engage with Foodsmart's *free* services, which by their very nature, cannot be *purchased*.

Put differently, because Foodsmart’s services were offered at no cost to the Plaintiff, the fact that the communications encouraged Plaintiff to use Foodsmart’s services does not automatically mean they were promoting a purchase—a required component to any “telephone solicitation” under the TCPA. Because Plaintiff could not establish that Foodsmart’s communications were made for the purpose of encouraging a purchase, his TCPA claims warranted dismissal.

Before concluding, the Seventh Circuit took special care to note the “unique set of facts” presented in the case at bar and warned that its decision should not be read “to create a sweeping loophole” as to telephone solicitations. Instead, the holding should be understood as a narrow one, requiring only that “telephone solicitations” be “initiated with the purpose of persuading or urging someone to pay for property, goods, or services.”

Hulce v. Zipongo Inc., No. 24-1623, 2025 WL 829603, 2025 U.S. App. LEXIS 923 (7th Cir. Mar. 17, 2025).

Western District of Texas Dismisses Claim Because an ATDS Cannot Sort Through List of Stored Numbers

The U.S. District Court for the Western District of Texas granted Defendant DiTommaso Inc.’s motion to dismiss Plaintiff Mark Ortega’s TCPA claim for use of an automatic telephone dialing system (“ATDS”), but denied the motion as to Plaintiff’s other TCPA claim and state law claims under the Texas Business Commerce Code.

On February 29, 2024, Defendant Meridian, on behalf of Defendant DiTommaso, called Plaintiff’s cellphone, which Plaintiff had registered on the National Do-Not-Call Registry in 2012. In his Complaint, Plaintiff noted there was a “distinct pause and delay before anyone answered,” which Plaintiff cited in support of the proposition that Defendant Meridian used an ATDS to make this call. During the phone call, Defendant Meridian asked Plaintiff about business loans, and transferred Plaintiff to Remy Pastorelli, the owner of DiTommaso. After the call, Pastorelli texted Plaintiff. Plaintiff responded, informing Pastorelli his number was registered with the Do-Not-Call Registry and he no longer wished to be contacted. Pastorelli then texted Plaintiff twice more.

Plaintiff brought suit against Defendants DiTommaso and Meridian individually and on behalf of similarly situated individuals seeking class certification. Specifically, Plaintiff brought two claims under the TCPA and two claims under the Texas Business Commerce Code. Defendant DiTommaso responded with a motion to dismiss all claims.

First reviewing Plaintiff’s TCPA claims, the Court noted the TCPA contains two distinct sections that grant individuals a private right of action: 47 U.S.C. § 227(b) and § 227(c). Section 227(b) prohibits the use of an ATDS, which is “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random sequential number generator; and (B) to dial such numbers”; equipment that merely stores auto-dialed numbers is not an ATDS. In his Complaint, Plaintiff alleged Defendant Meridian used an ATDS when it first called him because there was a “distinct pause and delay before a live representative answered [his] call,” which showed the system “work[ed] through a list of numbers.” The Court, however, found Plaintiff’s allegation conclusory and that the facts pled did not give rise to a plausible inference that an ATDS was used. In fact, the Court stated the mere fact that the equipment Defendant Meridian used was working through a list of pre-stored numbers precluded the equipment at issue from being an ATDS. Therefore, the Court dismissed Plaintiff’s claim under § 227(b) of the TCPA.

Section 227(c) of the TCPA provides individuals with a private right of action if they received more

than one telephone call within any 12-month period by or on behalf of the same entity. In Plaintiff's First Complaint, he only alleged one call at issue, but in his Second Amended Complaint, he modified his claims to state Defendant Meridian placed "calls" to his cellphone number. The Court noted that in the Fifth Circuit superseded pleadings are not treated as judicial admissions and that the dispute between the parties regarding the number of calls at issue is a factual dispute better suited for resolution at summary judgment or trial. Defendant DiTommaso also took issue with the fact Plaintiff did not allege an agency relationship between Defendants Meridian and DiTommaso. The Court disagreed, finding Plaintiff's allegations that DiTommaso outsourced marketing to Meridian and relied on Meridian's leads to generate sales was sufficient to support an inference of an agency relationship. Therefore, the Court denied Defendant DiTommaso's motion to dismiss Plaintiff's claim under § 227(c) of the TCPA.

Plaintiff also brought two state law claims under the Texas Business Commerce Code § 302.01 and § 302.053. Section 302.01 of the Texas Business Commerce Code requires any seller soliciting products in Texas to hold a current registration certificate and defines a "seller" as "a person who makes a telephone solicitation on the person's own behalf." Defendant DiTommaso argued Plaintiff's claim should be dismissed because he did not allege the agency relationship between DiTommaso and Meridian. However, just as it did with Plaintiff's TCPA claim, the Court found Plaintiff alleged sufficient facts to infer the agency relationship. Section 302.053 of the Texas Business Code authorizes any person who received a communication in violation of the TCPA to recover damages. Seeing as how the Court did not dismiss all of Plaintiff's TCPA claims, the Court similarly could not dismiss this state law claim.

Ortega v. DiTommaso Inc., 2025 WL 440278, 2025 U.S. Dist. LEXIS 22227 (W.D. Tex. Feb. 6, 2025)

New Jersey District Court Dismisses Bare and Conclusory TCPA Claims

The U.S. District Court for the District of New Jersey granted Defendant Liberty Bankers Life Insurance Company's motion to dismiss all of Plaintiff Howard Gutman's TCPA claims and state law fraud and tort claims.

Plaintiff alleged he received multiple phone calls from Defendant and that on September 20, 2022, Plaintiff answered a phone call from Defendant soliciting life insurance. During that phone call, Plaintiff asked Defendant to stop calling him. On June 17, 2024, Plaintiff filed suit in New Jersey state court alleging violations of "state and federal do-not-call list[s]," the New Jersey Consumer Fraud Act ("NJCFRA"), and common law intrusion upon seclusion. Defendant removed the case to federal court and filed a motion to dismiss.

The Court noted that although not clear from the face of the Complaint, Plaintiff asserted two separate TCPA claims: one under § 227(b) for use of an ATDS and one under § 227(c) for contacting a telephone listed on the National Do-Not-Call Registry without prior consent. In its motion to dismiss, Defendant stated that Plaintiff's claims were bare and conclusory because he did not plead sufficient facts to support either claim. For example, Plaintiff did not allege who made the calls, when the calls were made, or the numbers from which the calls were made. The Court agreed, and it noted a properly pled claim must allege that the defendant called a cellular telephone number using an ATDS and without the recipient's prior express consent. The Court found Plaintiff did not provide sufficient facts to allow the Court to plausibly infer that an ATDS was used. To survive a motion to dismiss, a complaint alleging a § 227(c) violation must plead sufficient facts to support a plausible inference that plaintiff received multiple calls to its residential phone registered with the National Do-Not-Call list within 12 months by, or on behalf of, the same entity. The Court found this claim also was not

properly pled because Plaintiff did not allege he received multiple calls within 12 months or that his cell phone number was used for residential purposes. Thus, the Court dismissed both of Plaintiff's TCPA claims.

Plaintiff also alleged Defendant's conduct violated the NJCFA. The NJCFA requires plaintiffs to demonstrate: (1) unlawful conduct by defendant; (2) an ascertainable loss by the plaintiff; and (3) a causal connection between the defendant's unlawful conduct and the plaintiff's ascertainable loss." The Court found that although Plaintiff stated each element, the facts pled did not support these elements. Specifically, Plaintiff failed to plead any allegation of loss.

Lastly, Plaintiff also alleged common law intrusion upon seclusion which requires an intentional intrusion upon the seclusion of another that is highly offensive to a reasonable person. The Court found because Plaintiff did not identify what private information of his was intruded upon the Court could not plausibly infer this behavior would be highly offensive to a reasonable person.

Finding that Plaintiff failed to properly plead his TCPA, NJCFA, and common law tort claims, the Court dismissed Plaintiff's Complaint without prejudice.

Gutman v. Liberty Bankers Life Ins. Co., 2025 WL 615128, 2025 U.S. Dist. LEXIS 34334 (D.N.J. Feb. 26, 2025)

Eastern District of New York Dismisses TCPA Claims for Lack of Subject Matter Jurisdiction Following Plaintiff's Settlement with a Non-Party

The U.S. District Court for the Eastern District of New York entered an order adopting the report and recommendation of Magistrate Judge Cheryl Pollack's dismissal of Plaintiff Todd Bank's claim against Defendants Consumer Tax Advocate, LLC ("CTA"), Countrywide Debt Relief LLC ("CDR"), Loop Holdings LLC ("Loop"), Verify Debt Solutions Inc. ("Verify"), and Surefire Business LLC ("Surefire") for lack of subject matter jurisdiction.

On October 13, 2023, Plaintiff received a phone call supposedly from Defendant Loop, although Plaintiff did not include the phone number that made the allegedly offending call. On December 18, 2023, Plaintiff commenced a class action lawsuit alleging TCPA violations under § 227(b) for use of an ATDS. In his Complaint, Plaintiff alleged Loop made this phone call "pursuant to contracts" with the other Defendants, but Plaintiff alleged no other facts showing the relationship between Loop and the other Defendants. In email communications with defense counsel, Plaintiff revealed he "previously settled with a 'nonparty-nonagent' regarding the phone call at issue," and he never denied receiving more than the statutorily allowed \$1,500 for a single knowing and willful TCPA violation. Defendants CTA, CDR, Loop, and Verify filed a motion to dismiss for lack of subject matter jurisdiction, which Defendant Surefire later joined.

On February 5, 2025, Judge Pollack issued her report and recommendation dismissing Plaintiff's claim against Defendants. Judge Pollack found Plaintiff's damages claim against Defendants was moot because Plaintiff received at least the maximum statutory damages under the TCPA in his settlement, thus depriving the district court of subject matter jurisdiction over the claim. Judge Pollack also concluded even if there were subject matter jurisdiction, Plaintiff's TCPA claim should be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Further, Judge Pollack advised Plaintiff if he were to refile his claims he should carefully consider the personal jurisdiction and class deficiencies Defendants argued in their motion to dismiss.

When deciding whether to adopt a dispositive report and recommendation of a magistrate judge, a

district court reviews all properly argued objections de novo and reviews remaining matters for clear error. Where an objection only reasserts an argument already considered by the magistrate judge, the district could need only to review the objection for clear error.

In Plaintiff's first objection, he argued Judge Pollack's finding of lack of subject matter was erroneous because there was no clear case law on the issue. The district court noted Plaintiff made this same argument to the magistrate judge, thus making it a perfunctory objection that the district court reviewed for clear error. When coming to her decision the Court noted that Judge Pollack acknowledged the lack of case law directly on point and engaged in a detailed analysis between the availability of statutory damages and mootness. The district court held that Judge Pollack's detailed analysis lacked any clear error, and it was especially persuaded by Plaintiff's repeated concession that he recovered the maximum amount of statutory damages.

In Plaintiff's second objection, he argued Judge Pollack erroneously concluded he failed to state a claim under Rule 12(b)(6). The district court noted because it adopted Judge Pollack's report and recommendation as to lack of subject matter jurisdiction it did not need to review this objection de novo. However, the district court stated even if it were to review the objection de novo, it would come to the same conclusion because Plaintiff's Complaint lacked sufficient factual contentions connecting the call made to any of the named Defendants.

The district court reviewed the remainder of Judge Pollack's report and recommendation for clear error and found none. Thus, the Court entered an order adopting Judge Pollack's report and recommendation dismissing Plaintiff's claim without prejudice.

Todd C. Bank v. Consumer Tax Advocate LLC, 2025 U.S. Dist. LEXIS 33993 (E.D.N.Y. Feb. 25, 2025)