

# TCPA Tracker for August - September 2024

October 15, 2024

## **California Court Dismisses TCPA Claim Because Job Recruitment Offers Do Not Qualify as Solicitations Under the TCPA**

The District Court for the Central District of California dismissed Plaintiff Dustin Anderson's TCPA claim for failure to state a claim against Defendant Nexa Mortgage, LLC.

Plaintiff alleged that Nexa Mortgage contacted him four times during a three-day span in March 2024 at his cell phone number that had been registered on the National Do-Not-Call list since 2019. He also alleged that he received three text messages and one phone call describing the benefits of becoming a "Mortgage Banker" with Nexa, which included higher commissions and better pricing. The caller purported to be Nexa's "Recruiting Manager" and left Plaintiff a voicemail following up on the text messages to provide Plaintiff with the ability to compare Nexa's rates. Plaintiff brought suit against Nexa alleging violations of the TCPA's prohibitions on multiple telephone solicitations within a twelve-month period, the use of an automatic telephone dialing system ("ATDS"), and the use of prerecorded calls.

On Plaintiff's first theory, the Court held that Plaintiff failed to state a claim because the four communications described in the complaint were not "solicitations" as defined by the TCPA. Noting that Ninth Circuit district courts described solicitations as calls that encourage a purchase by the consumer, and that calls asking to purchase the listener's labor are not solicitations, the Court distinguished the text messages and calls at issue from solicitations. Nexa's communications sought to entice Plaintiff to enter into an independent contractor relationship with Nexa, were placed by a "recruiting manager," and described loan products Plaintiff would sell to others in exchange for a commission. The Court described these communications as recruitments, not solicitations.

Second, the Court was unpersuaded by Plaintiff's allegations that Nexa relied on an ATDS to contact him. The Court pointed to the complaint's lack of detailed factual allegations surrounding the use of an ATDS, as well as the personalized nature of the text messages, (which included Plaintiff's name), as support for the opposite inference: that Nexa did not use an ATDS to send the communications.

Finally, the Court wrote that Plaintiff's allegation that the one phone call he received was prerecorded lacked the factual support necessary to meet the plausibility standard. The only factual support Plaintiff offered for this claim was that a "long pause" preceded the speaker's message on the voicemail, and TCPA precedent dictated that allegations of pauses alone, without more, are insufficient to support an allegation that a phone call was prerecorded.

Because Plaintiff had already amended his complaint once, the Court dismissed the claims with prejudice.

*Andersen v. Nexa Mortgage, LLC*, 2024 WL 3762098, 2024 U.S. Dist. LEXIS 143293 (C.D. Cal. Aug. 12, 2024).

## **FCC Enters into Consent Decree Including \$1,000,000 Civil Penalty with Telecom Firm Allegedly Responsible for Transmitting AI-Generated Biden Phone Calls**

On August 21, 2024, the FCC entered into a [consent decree](#) with Lingo Telecom, LLC to resolve the investigation by the Commission's Enforcement Bureau into Lingo Telecom's alleged violations of 47 C.F.R. § 64.6301(a). These alleged violations stemmed from Lingo Telecom's apparent role in applying incorrect Secure Telephone Identity Revisited and Signature-based Handling of Asserted Information Using toKENs attestations ("STIR/SHAKEN framework") to calls containing a generative artificial intelligence voice message purporting to be that of President Joseph Biden and [urging New Hampshire voters not to vote in the January 2024 primary election](#). The consent decree entry involved Lingo Telecom paying a \$1,000,000 civil penalty and agreeing to implement a robust compliance plan under the STIR/SHAKEN framework, while the FCC agreed to terminate its Notice of Apparent Liability for Forfeiture ("NAL") against Telecom.

The STIR/SHAKEN framework helps protect consumers by requiring voice service providers to verify and authenticate caller identification information throughout the entire path of a call. The framework includes three attestation levels, each indicating the level of knowledge a voice service provider has regarding the initiator of the call. This helps to both determine how much trust should be ascribed to the call's caller identification and to prevent "spoofed" calls with inaccurate caller identification.

According to the FCC's NAL, Lingo Telecom was the first voice service provider in the call path for 3,978 calls placed on January 21, 2024, to potential New Hampshire voters. The FCC characterized the calls as spoofed because they contained inaccurate caller identification information and included a prerecorded generative artificial intelligence deepfake message to create the impression that the voice on the recordings was that of President Biden. The FCC alleged that Lingo Telecom violated the Commission's rules when it provided the highest level of attestation permitted under the STIR/SHAKEN rules for these calls, making it less likely that the calls would be blocked or flagged as suspicious. This attestation level meant that, as the originating provider, Lingo Telecom had determined that the telephone number and caller identification information used on the calls were accurate and the caller was authorized to use that number. This attestation was granted despite the fact that the calls allegedly contained caller identification for a New Hampshire-based political operative who was not involved in placing the calls and did not authorize the use of their number for these calls.

The FCC's proposed penalty of \$2,000,000 for this alleged violation of 47 C.F.R. § 64.6301(a) was calculated by multiplying the base forfeiture amount of \$1,000 per incorrectly attested call. In this case, the Commission's Enforcement Bureau allegedly verified that 2,000 of the 3,978 calls included the allegedly incorrect attestation.

Lingo Telecom and the FCC negotiated and agreed upon the entry of a consent decree, under which Lingo admitted that it completed the 3,978 calls on January 21, 2024 to potential New Hampshire voters and assigned the calls the highest level of attestation in the STIR/SHAKEN framework. In addition to agreeing to pay a \$1,000,000 civil penalty to the U.S. Treasury, Lingo agreed that it will establish a Compliance Plan to ensure its future adherence to Communications Laws and the STIR/SHAKEN Rules. This Plan will be implemented by an employee designated as a Compliance Officer and responsible for developing a compliance training program and manual for all covered Lingo employees, as well as annual reports filed with the FCC detailing said compliance with Communications Regulations until August 21, 2027.

*In re Lingo Telecom LLC*, Order Adopted, FCC DA 24-790, 2024 WL 3915892, 2024 FCC LEXIS 2321

(F.C.C. Aug. 21, 2024) (*terminating* Notice of Apparent Liability for Forfeiture, FCC 24-60, 2024 WL 2828369, 2024 FCC LEXIS 1482 (F.C.C. May 28, 2024)).

### **Florida Court Holds That TCPA Claims Survive Plaintiff's Death**

The District Court for the Middle District of Florida denied Defendant PHBC Marketing, LLC's motion to dismiss, holding that a TCPA claim is a "remedial" action and therefore survives a plaintiff's death.

Bruce Settle passed away on January 1, 2024. Plaintiff Laurie Settle, as representative for Bruce Settle and on behalf of a putative class, filed a complaint on February 13, 2024, alleging that prior to his passing, Bruce Settle received two phone calls allegedly placed using an automatic telephone dialing system operated by PHBC Marketing. PHBC moved to dismiss the claims, arguing that Bruce Settle's TCPA claim was extinguished upon his death and that Plaintiff is an inadequate class representative.

A claim's survivability beyond a plaintiff's death is based on whether the court deems the statute to be "remedial" or "penal" in nature. Remedial actions compensate an individual for a specific harm suffered, while penal actions impose damages for a general wrong committed against the public. While the Eleventh Circuit had not specifically addressed whether a TCPA is extinguished upon a plaintiff's death, it had found TCPA claims to be "remedial" in other contexts, including insurance coverage disputes. Noting that Eleventh Circuit authority classified TCPA claims as more compensatory than punitive, the Court held that TCPA claims redress harm and allow for recovery by individuals rather than the general public. Finding TCPA claims to be remedial actions, the Court held that Bruce Settle's claims survive his death.

Defendant's second argument that Plaintiff Settle was an inadequate class representative also failed to convince the Court. PHBC asserted that because Plaintiff is not seeking and in fact cannot seek injunctive relief for lack of standing, this would preclude other class members from seeking injunctive relief as well. The Court denied PHBC's motion to dismiss both because a Rule 12(b)(1) motion is not the proper procedural vehicle to challenge the plaintiff's adequacy as class representative, and because the issue of the adequacy of a class representative is better decided with a more developed record after some discovery or an evidentiary hearing rather than on the pleadings.

*Settle ex rel. Settle v. PHBC Mktg., LLC*, 2024 WL 3638007, 2024 U.S. Dist. LEXIS 136072 (M.D. Fla. Aug. 1, 2024).

### **California Court Dismisses TCPA Claim Because Putative Class Plaintiffs Failed to Plausibly Allege Defendants' Vicarious Liability**

The District Court for the Central District of California dismissed a putative class claim without leave to amend, finding that plaintiffs failed to state a claim alleging Shore Capital's vicarious liability for alleged violations of the TCPA by its purported agents.

Plaintiff Paul Sapan alleged that he registered his residential phone number on the National Do-Not-Call Registry in December 2007, but that he received three calls on October 23, 2019, from three different numbers with blocked caller identification information. Plaintiff stated that on the first call, an individual identifying himself as "Keven" and representing "American Financial" connected him to a speaker named "Adam" with "Shore Capital Mortgage," who then tried to pitch a mortgage refinancing service to Plaintiff, but Plaintiff replied that he was not interested and hung up. Plaintiff characterized his interactions on the first call as "play[ing] along," but alleged that he did not have

an established relationship with either entity and did not give either entity permission to call his residential telephone line. Nonetheless, Plaintiff's Complaint stated that he subsequently received two more calls from these same individuals on October 23 and that he again reiterated that he was not interested in their services and hung up.

Importantly, Plaintiff levied these allegations in his Second Amended Complaint, following the Court's dismissal with leave to amend of his First Amended Complaint for failure to allege sufficient facts to support any possible theory of agency between the callers and Shore Capital.

Plaintiff claimed that he then conducted an investigation into these entities and found only one company with the name "Shore" in Orange County that sold mortgage products: defendant Shore Capital Corporation. Plaintiff inferred that "Shore Capital Mortgage," the entity "Adam" mentioned on the calls, was in fact one and the same with Defendant Shore Capital Corporation. Shore Capital Corporation confirmed to Plaintiff that the "Adam" who spoke with him was actually a current employee of Shore Capital, but had not been when Plaintiff spoke with him on October 23, 2019. The caller confirmed that he spoke with Plaintiff on the first call after the transfer and that he placed the second call to Plaintiff from his cell phone. Despite Shore Capital's denial, Plaintiff asserted his belief that the caller "could have been an agent of [Shore Capital Corporation] or an agent of a company working for Shore."

Because the parties agreed that direct liability under the TCPA was not at issue in this case, the Court analyzed only Shore Capital's potential vicarious liability under each of four agency law theories: employment (*respondeat superior*), apparent authority, ratification, and actual authority.

Under the employment theory of agency, Plaintiff alleged that "Adam," who spoke to him on the phone, was an employee of both Shore Capital and of another entity engaged by Shore Capital to place the calls. But the Court rejected these allegations as conclusory because they included no facts that would show that Shore Capital had or exercised any control over "Adam." The Court similarly concluded that the Second Amended Complaint failed to include any facts that would support apparent authority on the part of the callers, since the only link alleged between them and Shore Capital was the callers' representation that they were calling on behalf of "Shore Capital Mortgage" and the Complaint did not include any factual allegations regarding any action taken by Shore Capital Corporation itself. Plaintiff's reliance on a ratification theory to establish an agency relationship was also unconvincing, as the Court pointed out the Complaint's lack of any facts showing an observable action by Shore Capital that could support its knowing acceptance of the callers' benefits. Finally, the Court rejected Plaintiff's allegations that the callers were acting with actual authority, finding Plaintiff's allegation based on the inference that the caller mentioned a shortened version of Shore Capital's name insufficient to plausibly allege an agency relationship. The Court noted that even if the caller represented that they worked for Shore Capital *Corporation*, and not just "Shore Capital Mortgage," this statement alone was not enough to adequately allege that the caller was Shore Capital's agent and acted with actual authority.

In dismissing the claim without granting leave to amend, the Court repeatedly noted that Plaintiff's Second Amended Complaint was deficient in many of the same respects as the First Amended Complaint, despite the Court noting these deficiencies in a previous dismissal and granting Plaintiff leave to re-file at that time to add additional facts supporting the allegations.

*Sapan v. Shore Cap. Corp.*, 2024 WL 4002622, 2024 U.S. Dist. LEXIS 43866 (C.D. Cal. Aug. 23, 2024).

**New York Court Holds That Dialing System That Draws from Pre-Existing List of Phone Numbers is not an ATDS**

The District Court for the Southern District of New York granted summary judgment against a claim alleging that a Manhattan Lexus dealership violated the TCPA by using an automatic telephone dialing system (“ATDS”).

Honda of Manhattan (“HOM”), a car dealership in New York, signed agreements with its customers whereby the customers consented to receive communications from HOM. When HOM closed, it sent emails and text messages to its customers stating that HOM’s “sister dealership Lexus of Manhattan is still capable of servicing your Honda.” The messages also allowed customers to opt-out of receiving future communications. HOM then provided Defendant with a list of HOM customer contact information. Between February and November 2017, Defendant sent text messages to customers whose contact information was on the list and who had not opted out of receiving communications. Defendant used a platform called Zipwhip Version 1.0, Economy Package (“Zipwhip”) to send these messages to former HOM customers. This version of Zipwhip did not generate random phone numbers. Instead, all of the phone numbers that Defendant texted came from the HOM list.

Plaintiffs brought a class action suit against Defendant alleging multiple violations of the TCPA. Plaintiffs’ first claim was premised on the allegation that Zipwhip is an ATDS. The TCPA prohibits the use of an ATDS to call a phone number absent an emergency or the prior express consent of the called party. The Court held that Defendant’s use of Zipwhip did not constitute an ATDS because Zipwhip did not automatically or randomly generate phone numbers. On the contrary, Defendant’s list of phone numbers was drawn from other sources, including customers who themselves voluntarily provided these phone numbers. As such, the Court granted summary judgment in favor of Defendant on this claim.

The Court also granted summary judgment in favor of Defendant on Plaintiffs’ request for treble damages because the Court held that “no reasonable finder of fact could find that Defendant knowingly or willfully violated the TCPA and its regulations.”

The Court denied summary judgment on Plaintiffs’ remaining claims, which allege that Defendant violated TCPA regulations prohibiting telephone solicitations to phone numbers on the National Do Not Call Registry. The Court held that a reasonable jury could find that Plaintiffs registered for the Do Not Call Registry and did not have an established business relationship with Defendant.

*Watson v. Manhattan Luxury Automobiles, Inc.*, 2024 WL 4238307, 2024 U.S. Dist. LEXIS 170155 (S.D.N.Y. Sept. 19, 2024).