

TCPA Quick-hitter: North Carolina Federal Court Dismisses TCPA Claim For Failing To Allege Lack Of Consent To Calls

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Here's a quick update for TCPAWorld concerning the on-going battle across the country regarding what exactly constitutes a *prima facie* case under the TCPA. Many courts have come to the determination that a plaintiff's *prima facie* claim under the TCPA concerns alleging only that the plaintiff's cellular telephone was called using an ATDS. In their reasoning, those courts typically find that the lack of "prior express consent" is a defendant's affirmative defense, and therefore a plaintiff's claim is not defective for failing to allege any lack of consent or revocation of consent.

Some other courts, however, continue to find that allegations regarding the lack or revocation of consent is a necessary element of the plaintiff's claim – which, if not alleged, requires dismissal of the complaint. And it appears the Eastern District of North Carolina has taken the latter view of what must be alleged under the TCPA in its hot-off-the-presses opinion in *Vitale v. Nationstar Mortg. Llc*, 2019 U.S. Dist. LEXIS 152701 (E.D.N.C. Sep. 9, 2019).

In *Vitale*, the facts and claims are a bit messy (for interested readers, it involved a bankruptcy, mortgage loan modification, and various claims under certain "alphabet-soup" statutes brought both under North Carolina law and federal law). For our purposes, however, the facts are relatively simple and concern only one alphabet-soup statute (***hint*** – the TCPA). Specifically, the Vitales were purportedly behind on mortgage payments and Nationstar allegedly repeatedly called them in connection with those late payments. As a result, one of the claims brought against Nationstar was founded on the TCPA. In two paragraphs-worth of analysis, however, the district court rejected the claim outright.

According to the district court, the TCPA requires that a plaintiff allege the following *prima facie* elements: "(1) a call was placed to a cell or wireless phone; (2) by the use of any automatic telephone dialing system or [by] leaving an artificial or prerecorded message; (3) without prior consent of the recipient." According to the court, the Vitales did not "plausibly allege[] that they did not initially consent to receive calls from Nationstar. . . . [Therefore,] the court dismisses plaintiffs' TCPA claim."

Wow. Big win for Nationstar here.

Interestingly, the *Vitale* court relied upon a single 2015 decision from a federal magistrate judge in the

Northern District of Georgia to arrive at this standard. This is interesting for two reasons: (1) the court (based in North Carolina and within the Fourth Circuit) failed to use any TCPA standard articulated by the Fourth Circuit or another district court within that circuit to arrive at its formulation of the *prima facie* case elements – hinting that such a standard may not be settled in that circuit; and (2) the magistrate judge’s opinion, on which the *Vitale* court relied, has been criticized, indirectly, in other opinions for its *prima facie* claim formulation.

In particular, the magistrate’s opinion relied on an Eastern District of Michigan case, *Pugliese v. Prof'l Recovery Serv., Inc.*, 2010 U.S. Dist. LEXIS 64111 (E.D. Mich. June 29, 2010), to arrive at its formulation of the TCPA’s *prima facie* elements. Yet, the *Pugliese* decision’s formulation has been criticized for placing the obligation on a plaintiff to allege initially lack of consent in his or her complaint, while at the same time noting that the issue of “consent” is an affirmative defense in “the very next sentence in that opinion” See *Mashiri v. Ocwen Loan Servicing, LLC*, 2013 U.S. Dist. LEXIS 154534, at *14 (S.D. Cal. Oct. 28, 2013).

Hm.

To say that federal courts throughout the country are inconsistent in their application of relevant TCPA standards is an understatement. However, the *Vitale* court’s decision is a good reminder that interpretations of the TCPA remain in flux and, even if other courts have seemingly resolved a particular issue, those arguments may still bear fruit elsewhere and in other jurisdictions.

Stay alert out there, TCPAWorld.

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