

## TCPA Litigation Update — What’s Covered by TCPA? 7th Circuit Upholds Wireless Carrier Exemption; 11th Circuit Rejects Broad Definition of ATDS

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A 7th Circuit judge recently affirmed the dismissal of a Telephone Consumer Protection Act (“TCPA”) putative class action against Subway Restaurants Inc. In the 2016 case, Matthew Warciak alleged that he received an unsolicited coupon from T-Mobile that read:

**“This T-Mobile Tuesday, score a free 6” Oven Roasted Chicken sub at SUBWAY, just for being w/ T-Mobile. Ltd supply. Get app for details.”**

Due to a governing arbitration clause, Warciak did not name T-Mobile in the lawsuit. Instead, he alleged that Subway had an agency relationship with T-Mobile and that Subway should be held liable for the alleged TCPA violation.

Subway filed a Motion to Dismiss. The district court granted the Motion to Dismiss, finding “the complaint lacked sufficient facts alleging Subway’s conduct to support [Plaintiff’s agency claims].” The district court also found that the wireless carrier exemption applied, “and therefore, no underlying TCPA violation exists.”

The 7th Circuit affirmed, finding that the Complaint lacked allegations that Subway could be vicariously liable for T-Mobile’s text. Moreover, the Complaint failed to allege that Subway actually made T-Mobile its agent – Warciak only alleged Subway “engag[ed] in a contractual relationship with T-Mobile...[but] not all contractual relationships form an agency.” The Complaint failed to allege that Warciak could have reasonably believed that T-Mobile was acting on Subway’s behalf. The text indicated that it was sent by T-Mobile and that T-Mobile maintained control over the message. Accordingly, no agency relationship was pled and Subway could not be held liable.

The 7th Circuit also found that the lawsuit was barred by the TCPA’s wireless carrier exemption. The wireless carrier exemption excludes wireless providers from liability for violations of the TCPA, if the customer is not charged for the communication. In *Matthew Warciak et al. v. Subway Restaurants Inc.*, Case No. 19-1577, Warciak conceded that T-Mobile was his carrier, and he was not charged for the text. “Therefore, the district court properly applied the wireless exemption when it found no TCPA violation existed based on the facts alleged in the complaint.”

In all, this decision calms wireless carriers, many of whom market nearly identical promotions.

The 11th Circuit also came out with a defendant-friendly ruling last month. Its decision in *Glasser v. Hilton Grand Vacations Company* rejects an expansive interpretation of a key definitional term in the TCPA – i.e., what constitutes an ATDS (automatic telephone dialing system).

In *Glasser*, the plaintiffs alleged that they each received more than a dozen unsolicited phone calls to their cell phones from the two defendants. While the defendants admitted that they placed the calls, they argued that the calls did not violate the TCPA because an ATDS had not been used. The district court found that one defendant's dialing equipment was not an ATDS because it required human intervention, but that the other defendant's dialing equipment did qualify as an ATDS. The matter was appealed.

The 11th Circuit noted that the dispute boiled down to the following question: does the ATDS definition include dialing equipment that can store telephone numbers and dial them even if a random or sequential number generator is not used (e.g., because the numbers come from a targeted list)? After detailed analysis, the Court ultimately held: No. An ATDS is only a dialer that uses a random or sequential number generator to store or dial numbers—dialing numbers from a targeted list does not qualify the machine as an ATDS.

The 11th Circuit holding differs from the 9th Circuit's holding in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), where the Court embraced an expansive view of the ATDS definition. This disagreement among the Circuits over the proper interpretation of a federal statute increases the likelihood that the Supreme Court will have to take up the issue in the near future. Defendants and plaintiffs alike are eager to see what comes next.

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