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Recent Decisions Helpfully Narrow TCPA Scope

By **Myriah Jaworski** (July 31, 2020, 3:29 PM EDT)

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At a time when unemployment has reached record heights due to the COVID-19 pandemic, the U.S. District Court for the Western District of New York recently provided much-needed clarity on the scope of the Telephone Consumer Protection Act in deciding that job opportunity text messages do not constitute advertisements or telemarketing under the TCPA, and dismissing with prejudice a putative class action complaint at the pleading stage.

Taken with a U.S. Supreme Court decision days later in which the TCPA largely withstood a direct challenge in Barr v. American Association of Political Consultants,[1] and the U.S. Supreme Court's agreeing to consider what constitutes an automatic telephone dialing system under the TCPA by its grant of the Facebook Inc. v. Duguid petition, there is much TCPA activity for defense and plaintiff counsel to consider as robocall class actions continue to be filed at astounding rates.

Enacted in the 1990s, the TCPA sought to regulate telemarketers' compliance with certain requirements before using an automatic telephone dialing system or a robocaller to contact consumers.[2] Despite its honorable intentions of reducing robocalls and other pernicious telephone scams, the TCPA has been leveraged to file thousands of class actions across the country and against legitimate businesses in almost every industry, resulting in multimillion-dollar awards and settlements.

Broad interpretations of the TCPA in some jurisdictions have led to a nearly limitless view of the act's application, removing it from its origins as a statue intended to prohibit invasive telemarketing by robocalls. All this has occurred at a time where there has seemingly been little or no decrease in the incidence of such robocalls.

What technologies constitute an automatic telephone dialing system, which is defined differently by jurisdiction, is one part of the unresolved difficulty with the TCPA. Another difficulty concerns the application of the TCPA to messages from legitimate businesses that are beneficial to consumers, and that do not pose a nuisance or privacy invasion. For these messages, businesses have sought exemptions from the TCPA by petition to the Federal Communications Commission, or relief through the courts. Until recently, that administrative and judicial relief has been issued sparingly.

But the U.S. District Court for the Western District of New York's decision in Samantha Gerrard v. Acara Solutions Inc.[3] adds to a growing line of cases that may help to change that.

In 2018, plaintiff and job seeker Samantha Gerrard filed a putative class action against Acara Solutions Inc. alleging that Acara had violated the TCPA by using an automatic telephone dialing system to send text messages to her to alert her to job opportunities in her area.

Acara denied the allegations and moved to dismiss the class action complaint, arguing that the plaintiff did not adequately allege use of an automatic telephone dialing system, and that under a growing set of cases informational and employment opportunity messages could not be regulated as "telemarketing" or "advertisements" under the TCPA, as they did not concern the availability of property, goods or services.[4] In 2019, the magistrate judge issued a report and recommendation rejecting Acara Solution's arguments.

Acara Solutions Inc. objected, and on June 30, the U.S. District Court for the Western District of New York rejected the magistrate judge's recommendations and dismissed with prejudice Gerrard's TCPA putative class action complaint. The court held that Acara Solution's practice of contacting job seekers with employment opportunities is not actionable as pled by plaintiff Gerrard under the TCPA. The court held that: "Because the text messages identified in the Complaint are neither advertisements nor telemarketing, Gerrard fails to state a claim under the TCPA."

The district court's analysis of the TCPA and its implementing regulations lead the court to determine that "when the statute and regulations are read together, the prohibited [TCPA] activity narrows." Such narrowing excluded the job opportunity text messages from the TCPA's reach where the plaintiff did not plead that they constituted "advertising or telemarketing" under the TCPA. The court then evaluated the text messages themselves, as screenshots in the Gerrard complaint, and determined that they were not advertisements or telemarketing, and did not otherwise encourage the purchase or rental of or investment in property, goods, or services, as required by the TCPA.

Even accepting the plaintiff's allegations as true, then, the court found that the messages:

> merely reference an employment opportunity—specifically, a contract position as a "Material Handler/Production Operator" in Buffalo Grove, Illinois. Some messages also state that Gerrard, if interested in the position, should "call/text Amy" at a certain phone number. ... Thus, the text messages are not advertisements nor telemarketing, as defined in the [TCPA] regulations.

The court's dismissal of a TCPA class action at the pleading stage, which is uncommon, sends a strong signal that a higher scrutiny of a plaintiff's pleadings and the nature of a plaintiff TCPA claim is required. Importantly, the court dismissed the Gerrard complaint with prejudice, holding that any repleading would be futile. According to the court, "the problem with [plaintiff's TCPA claim] is substantive; better pleading will not cure it."

The Acara Solutions decision adds to a growing line of cases that hold that offers of employment may not be directly subject to the harsher provisions of the TCPA as a matter of law. Courts appear hesitant to find that employment messages, which benefit job seekers and the economy alike, may form the basis for massive TCPA class liability.

For example, in 2013 the U.S. District Court for the Southern District of California in Friedman v. Torchmark Corp.[5] found calls to a residential landline inviting the recipient to attend a "recruiting webinar" were "similar to [an] offer of employment" and therefore were neither unsolicited advertisements nor telephone solicitations as regulated by the TCPA.

And then in 2014, in AL and PO Corp. v. Med-Care Diabetic & Medical Supplies Inc.,[6] the court found that "drawing attention to a job opening does not equate to promoting the 'commercial availability or quality of any property, goods, or services."

In 2015, the U.S. District Court for the Northern District of California in Reardon v. Uber Technologies Inc.[7] held that "texts from Uber seeking to recruit drivers were not attempts to promote a 'good' (its application) to those drivers, but instead was an attempt to recruit drivers so that those potential drivers could provide services to riders." And more recently in 2018, the U.S. District Court for the Northern District of Illinois in Gary v. TrueBlue Inc.,[8] reiterated that "employment opportunity texts ... do not qualify as telemarketing as a matter of law."

With the addition of this year's Acara Solutions decision, the TCPA pendulum may be swinging away from historically broad judicial interpretations of the TCPA's provisions, and toward a narrower interpretation of the scope of the TCPA's prohibited activity. This could mean that defendants in TCPA class actions may find relief from such lawsuits at earlier stages of the litigation.

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Disclosure: In Samantha Gerrard v. Acara Solutions Inc., Jennifer A. Beckage and Myriah V. Jaworski at Beckage represented Acara Solutions.

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[1] Barr v. American Association of Political Consultants, 5901 U.S. ___ (July 6, 2020); 140 S. Ct. 2335

[2] 47 U.S.C. § 227(b)(1)(A)(iii)

[3] Samantha Gerrard v. Acara Solutions, Inc., 18-cv-1041, 2020 WL 3525949 (W.D.N.Y. June 30, 2020)

[4] See 47 C.F.R. § 64.1200(f)(12).

[5] Friedman v. Torchmark Corp., No. 12-CV-2837-IEG (BGS), 2013 WL 4102201, (S.D. Cal. Apr. 16, 2013)

[6] AL and PO Corp. v. Med–Care Diabetic & Med. Supplies, Inc., 2014 WL 6999593, at *2 (N.D. Ill. Dec. 10, 2014)

[7] Reardon v. Uber Tech., Inc., 2015 WL 4451209, at *5 (N.D. Cal. July 19, 2015)

[8] Gary v. TrueBlue Inc., 2018 WL 3647046, at *9 (E.D. Mich. Aug. 1, 2018)