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The Business Suit

The newsletter of the Commercial Litigation Committee

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Committee Leadership

In This Issue

Leadership Notes

From the Chair: Come to the May 8–10 Super Conference in Austin, and See What All the Fuss Is About

By Michelle Thurber Czapski

Greetings, CLC! As you all must know by now, our annual conference is right around the corner, and it is not like any conference we've hosted before. I know, I know…the name seems a little, well…*boastful*, but there is so much content here, we had to let everyone know that we'd supersized it. In past years, the Commercial Litigation Committee has presented darn good seminars, with its many SLG's providing a wealth of information on a variety of topics, from e-discovery to financial services litigation to class actions, and more. At the same time, other groups within DRI (and sometimes, together with the CLC) have presented specialized seminars focusing on Class Actions, Government Enforcement, and Cyber Security. Those specialized seminars have been very successful; so much so that Government Enforcement and Corporate Compliance and Cyber Security have become their own stand-alone DRI Committees, and Class Actions has its own DRI Task Force. This year, we are all joining forces to put on a big event together—a "Super Conference"—where each of these groups will have a break-out session all its own on Thursday afternoon, and we will have plenary sessions together on Thursday morning and Friday. If that were not enough, our Young Lawyers are having their own breakout, which is taking place on Wednesday afternoon. So, as you can see, this seminar really is quite super.

If all of that programming were not enough, attendees can also participate in sessions hosted by the IP Litigation Committee, which is holding its own seminar in the Omni Austin Hotel as well. We will be joining with the IP folks for our networking activities, and it will give us a chance to catch up with our friends (and former committee-mates) in the IP Litigation Committee.

And, speaking of networking, we will have a slew of great things to do in Austin. We are so proud that DRI President Toyja Kelley will be joining us for our Diversity Reception on Thursday evening. Our ever-popular Women's Networking Lunch will be on Thursday as well. Several of our SLG's are also planning events (including the Bourbon SLG, although they haven't yet revealed their intentions). The Young Lawyers are holding a dinner *and* a cocktail party (because they have so much energy), there is talk of "bat watching," and a hands-on Community Service Project on Friday afternoon.

And, I'd be remiss if I didn't remind everyone to stop by our Commercial Litigation Committee meeting, which is absolutely open to all, on Thursday, May 9, at 4:45 p.m., right after the conclusion of the breakouts. Please consider this my personal invitation to hear all that our Committee is doing and has to offer your practice.

So, this, the first "Super Conference" thrown by the Commercial Litigation Committee, will truly be a super event. There is room for everyone; please join us if you can.

Michelle Thurber Czapski is a member with Bodman PLC, where she specializes in the defense of life, health, disability and ERISA cases, insurance coverage matters, class actions, and commercial litigation. Ms. Czapski is based in Bodman PLC's Troy, Michigan office, where she chairs the firm's Insurance Practice, leads the firm's attorney training program, and is a member of Bodman's ethics committee. She has served as lead trial counsel in matters across the country and has appeared in courts in numerous jurisdictions. She is active in DRI and the Life, Health and Disability Committee, and served as Program Chair of the 2016 Life Health Disability and ERISA Seminar. Ms. Czapski is the current chair of the DRI Commercial Litigation Committee.

From the Editor

By Jamie Weiss

I hope everyone can join our committee at its annual seminar in Austin from May 8–10. Austin has a wonderful host to a number of DRI conferences, and I believe this is the first time our committee will get to enjoy its hospitality. Ironically, I had the opportunity to visit earlier this year for another DRI seminar and was shocked and surprised to find it snowing on the final day of the seminar, since of course, I (and many others) had neglected to pack a coat, given that we were going to be in Texas.

There are no such concerns in early May, of course. This year is going to be our first Super Conference, and there are so many good reasons to sign up and join us. Our terrific chair, Michelle Thurber Czapski, laid out many of them in her "From the Chair" column, but I'll add one more—because it's an opportunity to meet some of the best commercial defense lawyers in the country and make and nurture friendships and collaborations that leads both to personal and professional satisfaction.

Our Business Torts and Contract Litigation SLG will also be hosting its annual dinner Thursday evening at Perry's Steakhouse & Grille. That dinner, which has in the past been at amazing locations like the Toronto Film Festival's Bell Lightbox and Printer's Alley in Nashville, always is one of the highlights of our seminar, and hopefully it's not so secret that you don't necessarily need to focus your practice on business torts or contract litigation to attend.

In the meantime, this issue of the *Business Suit* comes with two feature articles relating to litigation under the Telephone Consumer Protection Act, the first from Mike Pennington, Sarah Sutton Osborne, and Scott Burnett Smith about recent class action decisions and the second from Mark Olthoff about recent decisions interpreting what meets the "autodialer" standard. As always, we also have a pitch from Dwight Stone for joining our committee and the benefits that flow from DRI membership generally. I hope you all enjoy!

Jamie Weiss is a partner in the litigation group at Ellis & Winters. His complex commercial litigation practice includes matters as diverse as defending real estate developers from accusations of fraud, prosecuting claims on behalf of companies and individuals involving trade secrets and employee mobility, and defending cases involving crane and rigging accidents.

Feature Articles

Say What? Ninth Circuit Says Affirmative Defenses Can't Stop Class Certification Unless Defendant Proves the Merits of the Defense as to Every Single Class Member

By Michael R. Pennington, Sarah Sutton Osborne, and Scott Burnett Smith



Just when you thought litigating Telephone Consumer Protection Act (TCPA) class actions was as unsafe as it could get for defendants, the Ninth Circuit said, "Not so fast."

In *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923 (9th Cir. 2018), two chiropractic practices sought to represent a class of plaintiffs who allegedly received unsolicited faxes containing advertisements in violation of the TCPA. The district court denied class certification under Fed. R. Civ. P. 23(b)(3) on the grounds that consent was the primary issue to be adjudicated under the TCPA and the defendant offered a substantial showing that whether class members had provided consent could only be determined individually. The Ninth Circuit reversed and, in the process, managed to run a wrecking ball through what

many thought was well-settled law on the burden of proof at the class certification stage.

From Affirmative Defense to Burden of Proof

First, the Ninth Circuit detoured into a finding that consent is an affirmative defense in a TCPA case, a proposition that itself is not free from debate. The court then leaped from that conclusion to one even more radical: that because the defendant would bear the burden of proof on the merits of the consent defense at trial, the defendant also bore the burden of proving that consent was an individualized issue and that it predominated over common issues for class certification purposes. No other circuit has ever held that a defendant bears the burden of proof on any issue relating to class certification.

That's enough bull in the class action china shop for one day, right? Wrong. The defendant's showing that consent was an individualized issue consisted of proof of consent by various class members through various means. However, the defendant had not attempted to prove the presence or absence of consent as to each and every class member.

The Ninth Circuit concluded that McKesson had, therefore, only carried its burden of proving that consent was an individualized impediment to certification for some but not all class members. The Ninth Circuit also concluded that class members as to whom proof had been offered would be excluded from the class and the rest of the class could be certified. McKesson petitioned the Supreme Court for a writ of certiorari.

Amicus Brief Submitted to Supreme Court

On behalf of DRI, the Voice of the Defense Bar, your friends and humble narrators here submitted an amicus brief urging the Supreme Court to review the case. DRI argued that the Ninth Circuit's ruling effectively creates a presumption in favor of class certification in cases involving individualized affirmative defenses and impermissibly shifted the burden of proof on class certification. This, DRI argued, contravenes both Supreme Court precedent and the approach of every other circuit to address the issue.

Who bears the burden of proof on the merits of an issue at trial has nothing to do with whether the controversy as a whole is appropriate for class adjudication or the procedural requirements the reviewing court must follow in evaluating predominance under Rule 23. The case law until now has been uniform: The plaintiff bears the burden of proof on all issues pertaining to class certification. This case offers no sound reason in policy or in the text of Rule 23 to deviate from that long-settled approach.

DRI's amicus brief further points out that to defeat class certification under the Ninth Circuit's framework, the defendant is effectively forced to marshal the exact kind of individualized proof that class certification seeks to avoid. This, too, is a practical impossibility, such that the ruling effectively alters substantive law by gutting the defendant's ability to rely on affirmative defenses when a claim is brought on a class basis. The Rules Enabling Act makes clear that a mere rule of civil procedure is not supposed to have such an effect.

The insupportable consequences of such a drastic change in settled class action law are particularly acute in the context of TCPA class actions since the TCPA provides for potentially ruinous uncapped statutory damages for even the most minor and most technical violations, whether or not they produce any real injury.

We are hopeful that the Supreme Court will grant review in this important case, as it has profound implications for class action practice.

Mike Pennington has extensive experience in defending high stakes class actions and mass actions of all kinds, including class and mass actions involving mortgage servicing, insurance sales and claims practices, variable annuities, alleged product defects, construction defects, forced-placed insurance, due process and civil rights claims, and statutory damage class actions under the federal statutes such as the Fair Debt Collection Practices Act (FDCPA), the Real Estate Settlement Procedures Act (RESPA), the Telephone Consumer Protection Act (TCPA), and the Fair Credit Reporting Act (FCRA). In addition to chairing Bradley's Class Action Team, Mike is also chair of DRI's Class Action Task Force and DRI's Class Action Specialized Litigation Group.

Sarah Osborne's practice focuses on complex civil litigation. Within the Construction and Government Contracts Practice Group, Sarah has experience defending construction disputes and represents government contractors in prosecuting and defending bid protests before the Government Accountability Office and the United States Court of Federal Claims.

Scott Burnett Smith's practice covers class actions, complex litigation, and appeals. Scott has been involved in dozens of nationwide class actions in state and federal courts and has handled over 30 class action appeals.

TCPA Litigation: Uncertainty over Dialing Software

By Mark Olthoff

In relevant part, the Telephone Consumer Protection Act (TCPA) prohibits making any call or sending any text (other than a call or text for emergency purposes or made with the prior express consent of the called party) using "an automatic telephone dialing system . . . to any telephone number assigned to a . . . cellular telephone service." 47 U.S.C. §227(b)(1)(A)(iii). In other words, a caller may not use an "automatic telephone dialing system" (ATDS) to place a call or text to a cell phone without the recipient's prior express consent. The TCPA defines an ATDS as "equipment that has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. §227(a)(1).

What constitutes an ATDS is often a point of contention in TCPA litigation. Since the D.C. Circuit's opinion in *ACA International v. FCC,* 885 F.3d 687 (D.C. Cir. 2018), there has been a fog of uncertainty about how to determine if a device is an ATDS so as to bring into play the restrictions on unconsented calls. Courts have split on whether, in order for a dialing system to constitute an ATDS, the system itself must be able to generate the telephone numbers it calls in a random or sequential manner, or whether simply dialing from a list of targeted numbers is enough. Nonetheless, the majority of courts agree that the basic function and defining characteristic of an ATDS is the capacity to dial numbers without human intervention.

In a recent case, the Eastern District of Michigan found that the text messaging platform used to send 5,600 job opportunity text messages to the plaintiff (some after the plaintiff opted-out from receiving future text messages) was not an ATDS. Specifically, in order to send a text message to a candidate, an employee, first, would open the messaging platform web browser application on his desktop computer and enter his log-in credentials. Next, the employee would input criteria and search the database for potential candidates to fill open positions. Once the employee was satisfied with the pool of candidates, he manually would compose a text message that would be sent to all relevant candidates. The messages would be sent to a third-party SMS aggregator/provider, which, in turn, would transmit the messages to each candidate's wireless carrier to be delivered to the candidate's cell phone.

In finding that the messaging platform was not an ATDS—either by itself or in conjunction with the SMS aggregator/provider's platform—the court held that (1) there was no evidence that the platform(s) could store or produce numbers to be called using a random or sequential number generator, and (2) there is no per se rule that Internet-to-text messaging platforms are ATDS under the TCPA. *Gary v. TrueBlue, Inc.*, 2018 WL 4931980 (E.D. Mich. Oct. 11, 2018); *see also Gadelhak v. AT&T Servs., Inc.*, 2019 WL 1429346 * 5–6 (N.D. Ill. Mar. 29, 2019); *Duran v. LaBoom Disco, Inc.*, 2019 WL 959664 *5 (E.D.N.Y. Feb. 25, 2019) (defendant's use of ExpressText and EZTexting did not constitute use of an ATDS); *Thompson-Harbach v. USAA Fed. Sav. Bank*, 2019 WL 148711 *11 (N.D. Iowa Jan. 9, 2019); *Collins v. Nat'l Student Loan Program*, 2018 WL 6696168 (D.N.J. Dec. 20, 2018); *Richardson v. Verde Energy, USA, Inc.*, 2018 WL 6622996 *8 (E.D. Pa. Dec. 14, 2018); *Johnson v. Yahoo!, Inc.*, 2018 WL 6426677 (N.D. Ill. Nov. 29, 2018); *Roark v. Credit One Bank*, 2018 WL 5921652 (D. Minn. Nov. 13, 2018); *Ramos v. Hopele of Fort Lauderdale, LLC*, 334 F. Supp.3d 1262 (S.D. Fla. 2018); *Maddox v. CBE Grp., Inc.*, 2018 WL 2327037 (N.D. Ga. May 22, 2018); *Jenkins v. mGage, LLC*, 2016 WL 4263937 (N.D. Ga. Aug. 12, 2016).

On the other hand, some courts have considered a platform's capability to store and send text messages without human intervention *at the time of dialing* is the quintessential feature of an ATDS. In a decision last fall, the Ninth Circuit described the defendant's text messaging platform as operating as follows:

> Phone numbers are captured and stored in one of three ways: An operator of the Textmunication system may manually enter a phone number into the system; a current or potential customer may respond to a marketing campaign with a text (which automatically provides the customer's phone number); or a customer may provide a phone number by filling out a consent form on a Textmunication client's website.
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> When [the defendant] wants to send a text message to its current or prospective customers, a[n] . . . employee logs into the Textmunication system, selects the recipient phone numbers, generates the content of the message, and selects the date and time for the message to be sent. The Textmunication system will then automatically send the text messages to the selected phone numbers at the appointed time.

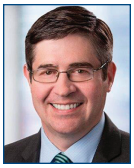
Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1048 (9th Cir. 2018). Without evaluating the specific level of human intervention, the court explained that "[c]ommon sense" indicates that human intervention of some sort is required before an autodialer can begin making calls, whether turning on the machine or initiating its functions, and found that there was a genuine issue of fact as to whether the defendant's platform was an ATDS. *Id.* at 1052; *see also Reyes v. BCA Fin. Servs.*, 312 F. Supp.3d 1308, 1319 (S.D. Fla. 2018) (explaining that, under binding FCC precedent, the basic function" of an ATDS is that it "can dial persons without human intervention regardless of whether called numbers are generated randomly or sequentially or from a set list," and holding platform was an ATDS because "regardless of how the numbers it dials are teed up" it "automatically dials telephone numbers without human intervention"); *Ammons v. Ally Fin., Inc.*, 326 F. Supp.3d 578, 588–89 (M.D. Tenn. 2018) (explaining that, "applying the appropriate standard here, the primary consideration . . . is 'whether human intervention is required at the point in time at which [Plaintiff's] number [was] dialed," and holding dialer was ATDS "as a matter of law" because defendant "made no real argument that a human intermediary acts *then*"); *Sessions v. Barclays Bank Delaware*, 317 F.Supp.3d 1028 (N.D. Ga. 2018) (finding allegations that defendant used ATDS sufficient to avoid dismissal motion); *Gonzalez v. Hosopo Corp.*, 2019 WL 1533295 (D. Mass. Apr. 9, 2019) (following rationale in *Marks*).

In an effort to bring more clarity to the issue, the FCC is considering a joint trade petition, in addition to comments submitted in response to two Public Notices that it issued *sua sponte* requesting public input on how ATDS should be defined. In a December 13, 2018 announcement of new rules concerning reassigned cell phone numbers, Commissioner O'Reilly commented: "Today's action is a positive development in reversing the previous FCC's deeply-flawed 2015 TCPA Order. However, much more work remains to be done on narrowing the prior Commission's ludicrous definition of 'autodialer' and eliminating the lawless revocation of consent rule. I am optimistic that our next steps will go a long way in reading the TCPA in a logical way and limiting wasteful and frivolous TCPA litigation . . . ." *FCC, Second Report and Order*, CG Dkt. 17-59 at pp. 48–49 (Dec. 13, 2018). While there is no timetable for the FCC's decision, further guidance is anticipated in the near future.

Mark A. Olthoff is a shareholder in the Polsinelli law firm in Kansas City, Missouri where he is a member of the Commercial Litigation Practice Group and co-chair of the firm's Class Actions practice area. He routinely represents financial services companies, financial institutions and lenders in a variety of complex commercial suits, including class actions, lending lawsuits, and officer and director liability claims, and often helps businesses facing regulatory claims and issues as well. He is a frequent author and speaker on various topics concerning class actions, piercing the corporate veil, business torts, and various financial litigation and regulatory issues. Mark also serves as chair of the Financial Services Litigation SLG for the DRI Commercial Litigation Committee.

Membership: Do You Know the Great Deals Available to New Members?

By Dwight W. Stone II



DRI always offers an array of incentives and enticements to help attract new members, and 2019 is no exception. It can be a challenge to remember the details, so here is a handy "cheat sheet" that you can use when you speak with folks who are prospective recruits:

- New Young Lawyer Members receive a certificate for a free seminar ($975 value) plus a $100 CLE Credit!
- New Individual Members receive a $100 CLE Credit!
- New Government Lawyer Members receive a $100 CLE Credit!
- Seminar Attendee Special: If you attend a DRI seminar and join DRI within the next 90 days, you receive 50 percent off the cost of your next seminar! (Keep this in mind when you speak with any prospective members attending our upcoming Super Conference in Austin.)
- SLDO Members: If you are a first-time DRI member, you receive a complimentary registration ($875 value) for one DRI seminar!
- Returning Members: If your membership lapsed at least six months ago and you rejoin DRI, you receive a $500 CLE credit!
- Corporate Members: Only $500 allows a corporation to enroll up to four individuals (attorneys and non-attorneys) as members, *and* in-house counsel receive free seminar registration to all DRI seminars (except the DRI Annual Meeting).

And don't forget, *you* will receive a $100 certificate toward the cost of your next seminar for every full dues member whom you recruit. Those certificates can stack up to serious savings.

Please be sure that the Commercial Litigation Committee and your name are included in the new member application forms as the referring committee and member (consider pre-populating these fields on the forms that you provide recruits). Regardless of what DRI committee(s) the new member joins, the CLC and you receive recruitment credit.

If you have any questions, call or email me at any time. Thanks for your help!

Dwight W. Stone II is a partner in Miles & Stockbridge P.C.'s Baltimore office. Dwight's practice includes products liability and class action defense, M&A litigation, insurance coverage disputes and other complex business disputes. He regularly represents clients before the U.S. Consumer Product Safety Commission (CPSC). He has been repeatedly named one of the "Top 100 Maryland Super Lawyers" in Maryland Super Lawyers, and is listed in Best Lawyers in America for Class Actions/Mass Torts, Commercial Litigation and Insurance Law.