

VoIP Services May Fall Beyond TCPA's Scope

By **Louis DePaul and Alison Viola** (March 2, 2018, 3:13 PM EST)

Voice over internet protocol or "VoIP" is "an alternative to traditional landline-based telephone service that allows people to make telephone calls over computer networks such as the Internet."^[1] Some familiar examples of VoIP applications are Skype, FaceTime, Google Voice and Hangouts.^[2] Given that VoIP services are readily accessible and simple to use, they are now more likely to be used in lieu of traditional telecommunication services. As such, the potential for VoIP technology to be implicated in litigation involving the Telephone Consumer Protection Act is increasing.



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Why are Businesses Concerned About the TCPA?

Initially enacted in 1991, the TCPA was aimed at telemarketers and regulated unsolicited telephone calls, faxes and text messages sent to consumers.^[3] Since its enactment, litigation alleging TCPA violations has grown exponentially and, often, includes multimillion dollar disputes.^[4]



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In August 2017, the U.S. Chamber Institute for Legal Reform conducted a study tracking TCPA litigation before and after a critical Federal Communications Commission ruling. The ruling, issued on July 15, 2015, was anticipated to trigger more TCPA litigation.^[5] As suspected, a 46 percent increase in litigation involving TCPA claims occurred.^[6] In the 17-month period before the FCC ruling, 2,127 lawsuits alleging violations of the TCPA were filed, while that number jumped to 3,121 in the 17-month period after the FCC ruling.^[7]

These TCPA lawsuits, targeting businesses in nearly 40 different industries, show no signs of slowing.^[8] Given the increase in TCPA litigation, businesses — particularly those utilizing marketing strategies via telecommunication — need to be aware of the developing body of case law related to VoIP technology.

Where do the Federal Courts Stand on the Interplay of VoIP Services and the TCPA?

A recent decision from the Western District of Pennsylvania, *Klein v. Commerce Energy Inc.*, 256 F.Supp.3d 563 (W.D. Pa. 2017), is instructive. In that case, Chief Judge Joy Flowers Conti of the Western District, interpreting the plain statutory language, held that free VoIP service does not fall within the scope of 47 U.S.C. § 227(b)(1) of the TCPA.^[9] Section 277(b)(1)(iii) of the TCPA states:

... [i]t shall be unlawful for any person within the United States ... to make any call ... using any automatic telephone dialing system[[10]] or artificial or prerecorded voice ... (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call ...[11]

Accordingly, to recover under § 227(b)(1)(iii), a plaintiff must establish that a call was made to one of five categories of receptors: (1) a paging service, (2) a cellular telephone, (3) a specialized mobile radio, (4) common carrier service, or (5) any service for which the called party is charged for the call.[12]

In rejecting the plaintiff's claim in Klein, the court recognized that no calls were made to the number assigned to a cellular telephone service.[13] Instead, the calls were dialed to the number assigned to Klein's free VoIP service.[14] Thus, because the calls at issue were not placed to cellular telephone or a service for which Klein was charged for the call, Klein's claims did not fall within the scope of the TCPA.

The court's findings in Klein are consistent with the spattering of other decisions addressing the interplay of the TCPA and VoIP technology. For instance, the District Court for the District of Massachusetts found that a TCPA claim under 47 U.S.C. § 227 (b)(1)(A) (iii) failed because the plaintiff did not demonstrate that she was charged for the disputed calls placed to her VoIP telephone line.[15]

Since the Klein decision, other courts have cited to it approvingly. In Baemmert v. Credit One Bank, N.A., No. 16-cv-540-jdp, 2017 WL 4271653 (W.D. Wisc. Sept. 25, 2017), the District Court for the Western District of Wisconsin cited to Klein for the proposition that a plaintiff must be charged for a VOIP service to qualify for treatment under the TCPA.[16] Similarly, in Lundstedt v. I.C. System Inc., the court looked to Klein to support its conclusion that the plaintiff failed to raise a viable claim under the TCPA.[17] In doing so, the Western District of Wisconsin and the District of Connecticut align themselves with other district courts addressing this issue. The net result is a growing body of case law, firmly recognizing that free VoIP services do not fall within the realm of the TCPA.

Klein could prove to be a critical decision in curtailing TCPA claims. Although individual circumstances may affect future VoIP litigation, the Western District of Pennsylvania in Klein has provided strong precedent to support the proposition that free VoIP services do not fall within the scope of the TCPA, granting a reprieve for businesses facing these types of claims.

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[1]. Nettalk.com Inc. v. MagicJack Vocaltec Ltd., No. 12-81022-CIV, 2014 WL 6751714, *1 (S.D. Fla. Dec.1, 2014).

[2]. U.S. Telecom Ass'n v. Fed. Commc'ns Comm., 825 F.3d 674, 719 (D.C. Cir. 2016).

[3]. See generally Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 370-71 (2012).

[4]. Becca Wahlquist, TCPA Litigation Sprawl: A Study of the Sources and Targets of

Recent TCPA Lawsuits 1 (U.S. Chamber: Institute for Legal Reform, August 2017).

[5]. Id. at 2.

[6]. Id.

[7]. Id.

[8]. Id. at 3.

[9]. See Klein, 256 F.Supp.3d at 563.

[10]. "The TCPA defines ATDS [automatic telephone dialing system] as equipment that has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator and the ability to dial such numbers." *Karle v. Southwest Credit Systems*, No. 14-30058-MGM, 2015 WL 5025449, *6 (D. Mass. June 22, 2015) (internal citations and quotation marks omitted).

[11]. 47 U.S.C. § 227(b)(1) (emphasis added).

[12]. Id.

[13]. Klein, 256 F.Supp.3d at 578.

[14]. Id.

[15]. *Karle*, 2015 WL 5025449 at *6.

[16]. *Baemmert*, 2017 WL 4271653 at *5.

[17]. *Lundstedt v. I.C. System, Inc.*, No. 3:15-cv-00824 (JAM), 2017 WL 4281057, * 4 (D. Conn. September 27, 2017).