

Where's the Beef? TCPA "Emergency Purposes" Exception Kills Class Action

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The potential payday of a TCPA class action is huge. Sometimes, it makes otherwise good attorneys convince themselves of really bad ideas when chasing those dollar signs. *Derrick v. Kroger Co.*, No. 3:19-cv-00106, 2019 U.S. Dist. LEXIS 135803 (N.D. Cal. Aug. 12, 2019) is one of those cases.

Derrick Brooks filed a class action lawsuit against the grocery store Kroger, alleging that Kroger made unauthorized telemarketing calls to him using an automatic telephone dialing system, in violation of the TCPA. His complaint was loaded with soundbites he found online from other consumers about the calls, selectively snipping quotes that persons were receiving "Automated call from Kroger" and "Call from Kroger stores."

The problem for Derrick was that the calls were not actually telephone solicitations. Rather, Kroger was warning consumers about potentially salmonella-tainted beef from its stores. Kroger moved to dismiss the complaint on the grounds that the calls were exempt under the "emergency purposes" exemption of the TCPA, which applies whenever calls are in relation to a matter affecting "the health and safety of consumers." Even more, Derrick's decision to include supposed exemplar "complaints" in his Complaint—a common strategy employed by plaintiffs' attorneys—hideously backfired, because the full text of those "complaints" made it clear that the calls were in fact in relation to Kroger's efforts to warn consumers. The district court expressly noted that it was "troubled by Plaintiff's misrepresentations in the complaint," and that Derrick's attorneys "purposely omitted details from customer complaint information it found online to make Kroger's calls seem nefarious."

Derrick argued that the calls were not for an emergency purpose because *he* was not in any "direct harm," again selectively citing portions of other court and FCC decisions involving the emergency purposes exception of the TCPA. In a straight-forward decision that should require little explanation (except to TCPA-plaintiffs' attorneys) the district court rejected this argument, concluding that Kroger had "a bona fide emergency in its tainted and potentially life-threatening beef," and was justified in making the calls.

One might think that a company calling consumers about poisoned beef is obviously an emergency purpose. Or even that a plaintiff's TCPA-lawyer might *sometimes* see beyond the dollars signs, ponder the policy implications, and think: "Is this *really* an argument I want to make?" At the very least, common sense has prevailed in this case... at least until the case gets to the Ninth Circuit.

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