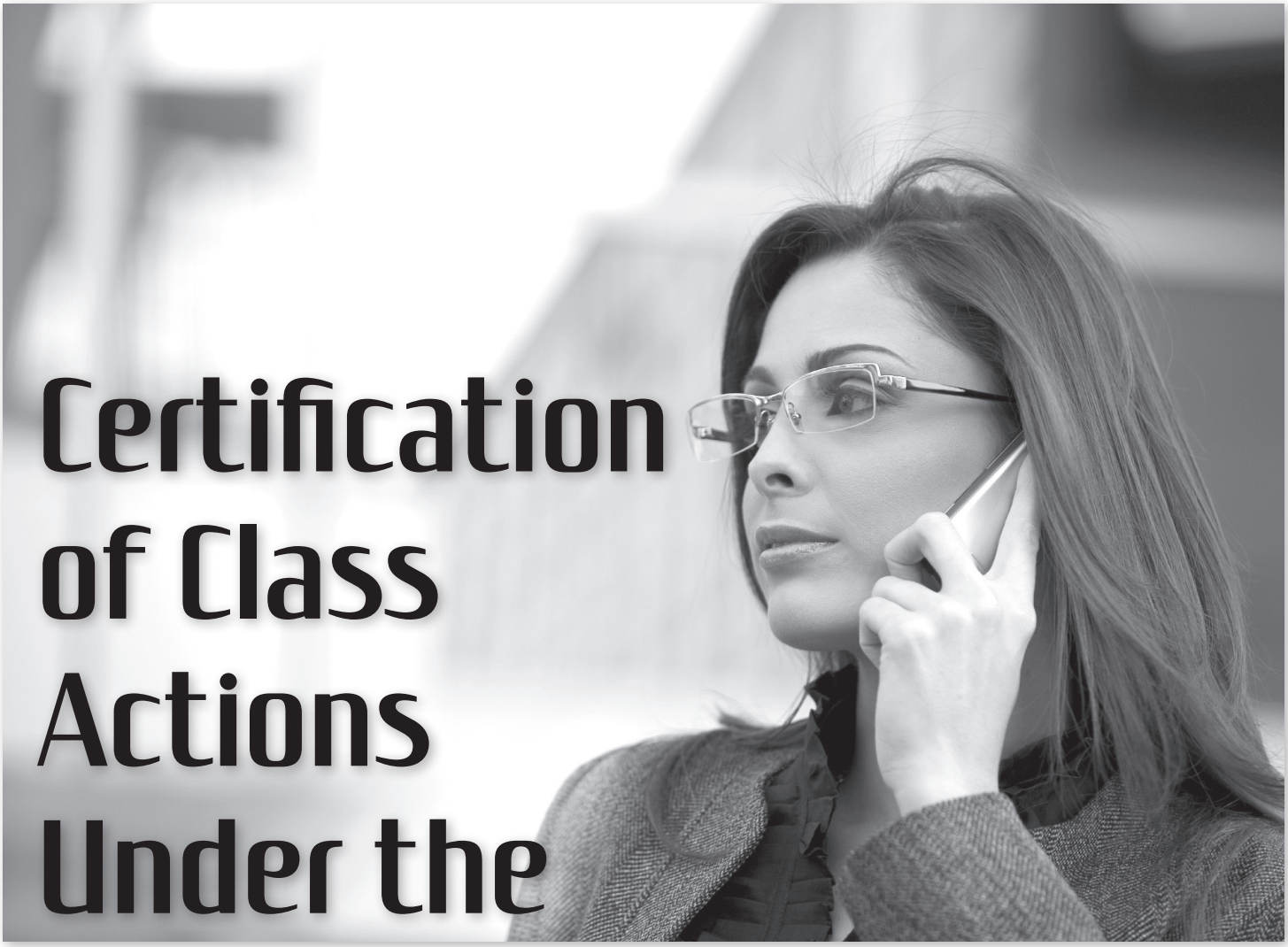

Certification of Class Actions Under the Telephone Consumer Protection Act and the Prohibition Against "Fail-Safe" Classes*

By Scott J. Hyman** and Eric J. Troutman***

I. Introduction

It seems simple enough: a plaintiff defines a putative class under the Telephone Consumer Protection Act (TCPA)[1] to include individuals who received autodialed calls/texts on their cellular telephones, but who had not given prior express consent.[2] So, what's the problem with this class definition?[3] The problem is that a putative class-member in a TCPA class action does not become a member of the class until they establish liability on the merits; i.e., that they did not give "prior express consent" under the TCPA. Such a recursive[4] class definition, requiring the merits of each class member's claim to be evaluated in order to determine class membership, has been called a "fail-safe" class. This class definition creates a "heads I win, tails you lose" situation where class members either receive a favorable judgment or are defined out of the class.[5]

Although Federal Rule of Civil Procedure (FRCP) Rule 23 does not explicitly mention "fail-safe" classes,[6] FRCP Rule 23's requirement that common questions pre-dominate is the flip-side of the same coin.

Courts should not hesitate to strictly construe and deny class certification of broad, recursive "fail safe" TCPA classes. The only inquiries then become whether a recursive "fail-safe" class can be amended and/or re-defined after the pleading stage.[7]

II. Issues Related to Class Certification of TCPA Class Actions under a Traditional Application of the Express Terms of FRCP Rule 23

Big-dollar settlements of high-profile TCPA class actions[8] have spawned an increase in TCPA class action filings nationwide.[9] Contested TCPA classes, however, remain notoriously difficult to certify.[10] True, some courts have certified TCPA classes. But, the number of procedural and substantive theories upon which courts have denied certification of class actions are limited only by varying criteria permitted by Federal Rules of Civil Procedure (FRCP) Rule 23.[11] Some courts have evaluated the issue of prior express consent under a "predominance" analysis, finding that common issues do not predominate[12] unless the telephone numbers called originated from a single source and there is a definitive means of determining that consent was lacking regarding all numbers from that source.[13]

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Other courts have applied a "typicality" analysis, particularly in "wrong-number" or "wrong-called-party" situations.[14] Still others have found the class action device not to be "superior" to other available methods for fairly and efficiently resolving the dispute in question.[15]

III. The Prohibition Against "Fail-Safe" Classes

A class action plaintiff must demonstrate the existence of an "aggrieved class."[16] Accordingly, FRCP Rule 23 and due process require that plaintiffs propose a class that is definite and ascertainable based on objective criteria that do not require a merits-based analysis.[17] Courts properly look below the surface of a class definition to determine whether the actual process of ascertaining class membership will require determination of the merits of every class member's claim.[18]

Such merits-inquiring class definitions are called "fail-safe" classes. At its most basic, a "fail-safe" class is one loosely defined as "all individuals wrongfully denied something by the defendant"— a definition that creates a "heads I win, tails you lose" situation where class members either receive a favorable judgment or are defined out of the class.[19]

Although the term is not used, the federal Manual for Complex Litigation confirms that "fail-safe" classes should be avoided to "avoid subjective standards…or terms that depend on resolution of the merits."[20] The United States Courts of Appeals for the Sixth and Seventh Circuits have held that "fail-safe" classes cannot be certified.[21]

The United States Court of Appeals for the Fifth Circuit, however, has allowed a recursive, "fail-safe" class to be certified.[22] While the United States Court of Appeals for the Ninth Circuit has shown hostility to fail-safe classes in an unpublished decision,[23] it also has rejected a challenge that a class definition was circular.[24] Nevertheless, most California district courts and state courts[25] refuse to certify "fail-safe" classes.[26]

IV. "Fail-Safe" TCPA Classes

A. FRCP Rule 23's Implied Prohibition Against "Fail-Safe" Classes Applies Even When All Other Textual FRCP Rule 23 Requirements are Met, Although Leave to Amend May Be Granted

Only a handful of TCPA class actions or class definitions have been evaluated through the "fail-safe" prism. The prohibition against "fail-safe" class action definitions is an independent ground to deny class certification of TCPA class actions, even if the class definition otherwise meets all of FRCP Rule 23's other explicit requirements.[27]

For example, in *Zarichny v. Complete Payment Recovery Services, Inc.*,[28] Judge Dalzell struck an FDCPA/TCPA class at the pleadings stage because it was an impermissible "fail-safe" class. Judge Dalzell found that the "fail-safe" analysis should be done before the analysis of the four requirements of Rule 23(a)–"numerosity" of class members; "commonality" to the class of questions of fact or law; "typicality"; and adequacy of the class representative. Judge Dalzell found that "ascertainability" does not appear in the text of Rule 23, but the ascertainability inquiry in a TCPA case itself triggers the "fail-safe" analysis. A putative TCPA class comprised of those people who received autodialed telephone calls without the recipient's "prior express consent" cannot be ascertained "without the sort of extensive fact-finding that class actions should avoid." Accordingly, Judge Dalzell struck the TCPA Plaintiff's class allegations from her lawsuit.

In *Taylor v. Universal Auto Group I, Inc.*,[29] Judge Strombom addressed certification of a "fail-safe" TCPA class at the class certification stage. Judge Strombom conducted an in-depth legal and factual analysis of the textual pre-requisites for certifying a TCPA class under FRCP Rule 23, and found most of the textual requirements met. Judge Strombom then held, however, that a TCPA class defined as those TCPA putative class members who did not give "prior express consent" to be autodialed on their cellular telephones was an impermissible

"fail-safe" class and, therefore, class certification should be denied. Judge Strombom found that a "fail-safe" class definition provided an independent basis to deny certification, explaining: "This Court, however, is persuaded that inclusion of the "without prior consent" language in the national classes definition makes it a "fail-safe" class, as clearly the issue of consent is central to determining defendant's liability."[30] Judge Strombom granted the plaintiff leave to amend the class to try to avoid the fail-safe class problem.

In *Sauter v. CVS Pharmacy, Inc.,*[31] Judge Graham found a prohibited "fail-safe" class when plaintiff defined the class as, "all persons within the United States who received a non-emergency telephone call from CVS to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice and who did not provide prior express consent for such calls." Judge Graham extensively analyzed prior TCPA jurisprudence applying or refusing to apply the "fail- safe doctrine," and concluded that the prohibition against "fail-safe" classes was consistent with FRCP Rule 23's requirements. Accordingly, Judge Graham granted the defendant's motion to strike the class-action allegations from the complaint, but granted the plaintiff leave to amend to try to cure the "fail-safe" problem with the class definition.

In *Lindsay Transmission, LLC v. Office Depot, Inc.,*[32] Judge Jackson struck a class action definition as constituting a "fail-safe" class applying an analysis largely similar to the "predominance" inquiry. She explained that "[d]etermining class membership will require the kind of individualized determinations, the absence of prior consent and the absence of a prior business relationship, precluded by Rule 23."[33]

B. Fail-Safe Classes at the Pleadings Stage and Discretion to Modify or Allow Modification of "Fail-Safe" Class Definitions

Most courts believe they retain the discretion to modify a "fail-safe" class definition, or to require the plaintiff to do so, as long as the re-defined class does not become over or under-inclusive in other ways.[34] Some courts have hesitated to address the "fail-safe" nature of a TCPA class definition at the pleadings stage – the proposed class might be redefined to avoid ascertainability or other "fail-safe" problems at a later stage. For example, in *Olney v. Job.com, Inc.*,[35] Judge O'Neill refused to strike class allegations, even though he concluded that the class definition purported to define a "fail-safe" class:

> It is true that Plaintiff's original proposed class is a "fail safe" class. Because the TCPA prohibits calls to cellular telephones using ATDSs unless prior express consent has been given, defining the class to include anyone who received such a call without prior express consent means that only those potential members who would prevail on this liability issue would be members of the class. However, in the Ninth Circuit, it is not necessary to deny certification (or in this case strike class allegations) simply because the initially proposed class is a "fail-safe" class.[36]

Other courts have hesitated to address the "fail-safe" nature of a TCPA class action at the pleadings stage when the court similarly perceived appellate hostility to striking class actions at the pleadings stage[37] or when the court was skeptical that the class definition is a "fail-safe" class.[38]

V. Conclusion

Although FRCP Rule 23 does not explicitly prohibit certification of "fail-safe" classes, it certainly implies it. Class actions filed under the TCPA create particular problems of certification due to the "fail-safe" nature of the typical class definition of individuals who were autodialed on their cellular telephones without their consent. Courts should not hesitate to find such definitions recursive or circular – even at the pleadings stage. Although leave to amend might be granted to allow a Plaintiff to attempt to cure the problems inherent with a "fail-safe" TCPA class definition, courts should not hesitate to strike or to deny certification to TCPA classes that remain inherently recursive and cannot cure their "fail-safe" defects.

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1 "No person or entity may initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system…(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." 47 CFR § 64.1200(a)(1).

2 Most district courts have held that "prior express consent" is an affirmative defense that need not be pleaded by the plaintiff.

See, e.g., Bates v. I.C. Sys., 2009 WL 3459740, *2 (W.D.N.Y. Oct. 19, 2009) (citing In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 F.C.C.R. 559, 564-65 (Jan. 4, 2008).) The FCC's ruling, however, provides that a dialer has the burden of proof only if "a question arises as to whether express consent was provided…." 23 F.C.C.R. 559, 564 - 65. That is, a caller seemingly must first put consent at issue before the burden of production shifts to the caller. The Court of Appeals for the Ninth Circuit accordingly held that a TCPA Plaintiff must plead an absence of prior express consent. Meyer v. Portfolio Recovery Assocs., LLC, 707 F.3d 1036, 1043 (9th Cir. 2012). *See also:* Steinhoff v. Star Tribune Media Co., LLC, 2014 WL 1207804 (D. Minn. 2014); Fields v. Mobile Messengers America, Inc., 2013 WL 6073426, *3 (N.D. Cal. 2013).

[3] Whether a "non-consent" class can be certified under the TCPA is one of the myriad of procedural problems created by TCPA, including legal disputes on even the most basic issues of the TCPA, such as standing, jurisdiction, or even what elements must be pleaded to state a claim. See, e.g., Eric J. Troutman, Scott J. Hyman & Divya S. Gupta, *Staying TCPA Cases under the Primary Jurisdiction Doctrine,* 68 Consumer Finance Law Quarterly Report 312 (2014). The TCPA's substantive reach is no more settled, with legal disputes on the most basic questions such as what an autodialer (ATDS) is, whether human interaction with technology disqualifies it as an ATDS, what constitutes prior express consent to receive autodialed calls, and whether a consumer can revoke express consent and, if so, whether it can be done orally. *Id.*

[4] "Recursion" is a term used in mathematics and logic when the application of a function to its own values generates an infinite sequence of values. See, generally, https://en.wikipedia.org/wiki/Recursion.

[5] *See generally,* Comment, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 Fordham L. Rev. 2769 (2013); see also Zarichny v. Complete Payment Recovery Services, Inc., 80 F. Supp.3d 610, (E.D. Pa. 2015) (TCPA class definition was a "fail-safe" class that required "determination on the merits before members are identified, creating what the Supreme Court called "one-way intervention").

[6] Rodman v. Safeway, Inc., 2014 WL 988992 (N.D. Cal. 2014) ("But this concept does not appear in the text of Rule 23").

[7] Warnick v. DISH Network LLC, 2014 WL 6680407 *4 (D. Colo. 2014) ("…Plaintiff has not shown why I should not convert the denial without prejudice of the Motion for Class Certification to a denial with prejudice.").

[8] *E.g.:* Malta v. The Federal Home Loan Mortg. Corp., 2013 WL 444619 (S.D. Cal. 2013); Arthur v. Sallie Mae, Inc., 2012 WL 4075238 (W.D. Wash. 2012); Agne v. Papa John's Int'l, Inc., 286 F.R.D. 559 (W.D. Wash. 2012).

[9] http://dev.webrecon.com/debt-collection-litigation-cfpb-com- plaint-statistics-october-2014/.

[10] *See generally,* Eric J. Troutman & Scott J. Hyman, *The Telephone Consumer Protection Act*, in DEBT COLLECTION IN CALIFORNIA §§ 2B.35-38 (CEB 2014).

[11] *See, e.g.*, Gene & Gene LLC v. Biopay, LLC, 541 F3d 318 (5thCir 2008).

[12] *See, e.g.*: Connelly v. Hilton Grand Vacations Co., LLC, 294 F.R.D. 574, (S.D. Cal. 2013) ("It is likely that each individual received a different amount of information regarding how his cell phone number would be used and there is at least a non-trivial possibility that some class members expressed consent in a manner that was colored by these evaluated individually, rather than on a class wide basis."); Kristensen v. Credit Payment Services, 2014 WL 1256035 (D. Nev. 2014) ("Kristensen's burden at the class certification phase is to 'advance a viable theory employing generalized proof to establish liability with respect to the class involved.'"); Chapman v. First Index, Inc., 2014 WL 840565 (N.D. Ill. 2014) (Denying certification where Plaintiff did not demonstrate "objective criteria by which class membership could be readily ascertained or a common method of proof by which lack of consent could be established on a class-wide basis."); Gannon v Network Tel. Servs., Inc., 2013 WL 2450199 (C.D. Cal. 2013) (individualized consent inquiries predominated in texting case); O'Connor v Diversified Consultants, Inc., 2013 WL 2319342, *4 (E.D. Mo. 2013) (denying certification because of unique evidentiary issues that will need to be resolved on individual-case basis).

[13] *See, e.g.*, Manno v Healthcare Revenue Recovery Group, LLC, 289 F.R.D. 674, 684 (S.D. Fla. 2013) (certifying class when individuals identified as putative class members during discovery on numerosity issue had no communications with defendant before alleged offending calls, so could not have expressly consented to be called); Targin Sign Sys., Inc. v Preferred Chiropractic Ctr., Ltd., 679 F.Supp.2d 894, 896 (N.D. Ill. 2010) ("Nor is there a whisper about those targets, or any of them, being people who, or institutions that, had consented" to the defendant's faxing them). One district court viewed a "split" of authority on TCPA class certification. See St. Louis Heart Center, Inc. v. Vein Centers For Excellence, Inc., 2013 WL 6498245 (E.D. Mo. 2013).

[14] *See, e.g.*, Buonomo v. Optimum Outcomes, Inc., 301 F.R.D. 292, 297 (N.D. Ill. 2014) ("Wrong number" class Plaintiff cannot represent class including debtor class members.); Labou v. Cellco Partnership, 2014 WL 824225 (E.D. Cal. 2014) (Preemptively decertifying class where non-customer attempted to represent claims of broader class including non-consenting customers.)

[15] Compare The Savanna Group, Inc. v. Trynex, Inc. 2013 WL 66181, * 16 (N.D. Ill. 2013). (Low recovery makes individual plaintiffs unlikely to pursue their claims in separate actions; class treatment "superior") with Smith v. Microsoft Corp.,297 F.R.D. 464, (S.D. Cal. 2014) (Denying certification in TCPA case for lack of superiority.)

[16] McLaughlin on Class Actions, Prerequisites To Class Certification, § 2.2 (2014).

[17] *See generally,* Rubenstein, *Rule 23(a) Prerequisites for Class Certification: Implicit Requirements – Definiteness,* in NEWBERG ON CLASS ACTIONS, § 3.6 (2014).

[18] *Id.*

[19] *See generally,* Comment, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 Fordham L. Rev. 2769 (2013); HERR, Annotated Manual For Complex Litigation, § 2.222 (2014).

[20] Herr, Annotated Manual For Complex Litigation, § 21.222 pp. 270 (Fed. Jud. Ctr. 2004). The Manual cites Forman v. Data Transfer, Inc., 164 F.R.D. 400, 403 (E.D. Pa. 1995), which was a "fail safe" TCPA class although it did not use that term. *Id.*, § 21.222 fn 827. In *Forman*, Judge Giles denied certification of a TCPA blast-fax class because the putative class was defined "the purported class as 'all residents and businesses who have received unsolicited facsimile advertisements' requires addressing the central issue of liability" and "[d]etermining a membership in the class would essentially require a mini-hearing on the merits of each case". *See also* Herr, Annotated Manual for Complex Litigation, § 2.222 (2014).

[21] *See, e.g.*, Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 538 (6th Cir. 2012); Randleman v. Fid. Nat'l Title Ins. Co., 646 F.3d 347, 352 (6th Cir. 2011); Adashunas v. Negley, 626 F.2d 600, 604 (7th Cir. 1980).

[22] *See*, In re Rodriguez, 695 F.3d 360, 370 (5th Cir. 2012); Mullen v. Treasure Chest Casino, 186 F.3d 620, 624 n.1 (5th Cir. 1999); Forbush v. J.C. Penney Co., 994 F.2d 1101, 1105 (5th Cir. 1993), *abrogated on other grounds* by Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

[23] Kamar v. RadioShack Corp., 375 Fed. Appx. 734, 736 (9th Cir.2010) (unpublished) ("Fail-safe" classes are unascertainable because the class definition would allow putative class members to avoid the effects of res judicata if they do not succeed on the merits of their claim, such that putative members either win or are not part of the class).

[24] *See* Vizcaino v. U.S. Dist. Court for W. Dist. of Wash., 173 F.3d 713, 722 (9th Cir. 1999), *amended*, 184 F.3d 1070 (9th Cir. 1999).

[25] Only two unpublished California state appellate decisions have addressed the prohibition against "fail-safe" class actions as such and by name: Canez v. King Van & Storage, Inc., 2010 WL 4948441 * 5 (Cal. App. 2 Dist. 2010); and Sony Electronics Inc. v. Superior Court, 145 Cal.App.4th 1086, 1095 (2006). Although not labeling such classes as "fail-safe" class actions, California Courts do hold that "It is error to certify a class if that class is defined in terms of ultimate liability questions." *See*, Hicks v. Kaufman & Broad Home Corp. 89 Cal.App.4th 908 (2001); Ghazaryan v. Diva Limousine, LTD., 169 Cal.App.4th 1524, 1531 (2008).

[26] *See, e.g.*, Kirchner v. Shred-it USA Inc., 2014 WL 6685210 n.3 (E.D. Cal. 2014); Brown v. Hain Celestial Group, Inc., 2014 WL 6483216 (N.D. Cal. 2014) ("If Hain loses, we won't." This is impermissible. It amounts to a "fail-safe" class in which membership will be determined by the Court's prior determination of Hain's liability."); Syed v. M-I LLC, 2014 WL 5426862 n. 4 (E.D. Cal. 2014) ("[A] 'fail-safe' class is one that includes only those who are entitled to relief [and] allow[s] putative class members to seek a remedy but not be bound by an adverse judgment-either those class members win or, by virtue of losing, they are not in the class and are not bound."); Gray v. County of Riverside, 2014 WL 5304915 (C.D. Cal. 2014) (A class is "fail safe" if the definition of the class shields the class members from adverse judgment); Trosper v. Styker Corporation, 2014 WL 4145448 (N.D. Cal. 2014) (The Ninth Circuit has held that "[t]he fail-safe appellation is simply a way of labeling the obvious problems that exist when the class itself is defined in a way that precludes membership unless the liability of the defendant is established); In re ConAgra Foods, Inc., ___ F.R.D. ___2014 WL 4104405 (C.D. Cal. 2014); Ubaldi v. SLM Corporation, 2014 WL 1266783 (N.D. Cal. 2014); Ortiz v. CVS Caremark Corporation, 2013 WL 6236743 (N.D. Cal. 2014); Roth v. CHA Hollywood Medical Center, L.P., 2013 WL 5775129 (C.D. Cal. 2014) October 25, 2013); Olney v. Job.com, Inc., 2013 WL 5476813 (E.D. Cal., 2014) (TCPA case); Gormley v. Nike Inc., 2013 WL 322538 (N.D. Cal. 2014); In re AutoZone Wage and Hour Employment Practices Litig., 289 F.R.D. 526, 545 - 46 (N.D. Cal. 2012); Connelly v. Hilton Grant Vacations Co., LLC, 2012 WL 2129364 (S.D. Cal. 2014) (TCPA case); Kas v. Mercedes-Benz USA, LLC, 2011 WL 5248299 (C.D. Cal., 2011); Thomasson v. GC Services Limited Partnership, 275 F.R.D. 309 (S.D. Cal., 2011); Schaffer v. Litton Loan Servicing, LP, 2009 WL 9436302 (C.D. Cal. 2009); Velasquez v. HSBC Finance Corp., 2009 WL 112919 (N.D. Cal. 2009); Brazil v. Dell Inc., 585 F.Supp.2d 1158 (N.D. Cal. 2008); Heffelfinger v. Electronic Data Systems Corp., 2008 WL 8128621 (C.D. Cal. 2008); Dodd-Owens v. Kyphon, Inc., 2007 WL 420191 (N.D. Cal. 2007).

[27] *See generally*, Comment, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 Fordham L. Rev. 2769 (2013).

[28] 80 F. Supp.3d 610, (E.D. Pa. 2014).

[29] 2014 WL 6654270 (W.D. Wash. 2014).

[30] Some courts, instead, have decided the issue through a predominance analysis, even though the class definition "treads close" to a fail-safe class. *See, e.g.*, Balschmiter v. TD Auto Finance LLC, 2014 WL 6611008 * 21 fn. 19 (E.D. Wis. 2014).

[31] 2014 WL 1814076 (S.D. Ohio 2014).

[32] 2013 WL 275568 (E.D. Mo. 2014).

[33] *See also,* Levitt v. Fax.com, 2007 WL 3169078 at *5 n. 5 (D. Md. 2007) (decertifying a fail-safe TCPA class); Booth v. Appstack, Inc., 2015 WL 1466247 (W.D. Wash. 2015); Salam v. Lifewatch, Inc., 2014 WL 49608947 (N.D. Ill. 2014); G.M. Sign, Inc. v. Franklin Bank, SSB, No. 06 C 949, 2007 WL 4365359, at *3 (N.D. Ill. 2007) (rejecting TCPA class where "the proposed class definition improperly includes a component of a lack of defense, namely proof of express permission or invitation prior to the receipt of the fax advertisement."); Kennard v. Electronic Data Syst. Corp., 1998 WL 34336245(Tex. Dist. Ct. 1998) (proposed TCPA class failed because "it requires the Court to determine whether a person gave prior express invitation or permission to receive the challenged fax and/or whether each potential class member had an existing business relationship with EDS.").

[34] *See generally* McLaughlin on Class Actions, Prerequisites To Class Certification § 2.2 at n. 28 (2014) (citing authorities).

[35] *See* Olney v. Job.com, Inc., 2013 WL 5476813 (E.D. Cal. 2013).

[36] *Id.*, at *11, citing In re AutoZone, Inc., Wage & Hour Employment Practices Litig., 289 F.R.D. 526, 546 (N.D. Cal. 2012).

[37] Connelly v. Hilton Grant Vacations Co., LLC, 2012 WL 2129364 (S.D. Cal. 2014); Haghayeghi v. Guess ?, Inc., 2015 WL 1345302 (S.D. Cal. 2015) ("The class, as currently defined is suspect as it requires a finding that Defendant sent unauthorized text messages to determine who is a class member; however, the Court finds it more appropriate to address the issue in a motion for class certification.").

[38] Wolfkiel v. Intersections Insurance Services Inc., 303 F.R.D. 287, 294, (N.D. Ill. 2014).