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| **Statement  of the Case** | **Color: Yellow** |
| **What does DISH do?** | **DISH is one of the largest pay-television providers in the country.** |
| **How does DISH advertise its services?** | **DISH contracts with thousands of independent retailers to help market its satellite TV subscription service.** |
| **How does DISH work with its independent retailers?** | **DISH’s contracts with retailers contain standards and guidelines for how retailers should market DISH’s products. But the retailers operate independently: They maintain their own offices, hire their own employees, create their own marketing strategies, and may even market DISH’s competitors.** |
| **What was DISH’s relationship with SSN?** | **SSN was one of the independent retailers that marketed DISH’s products. SSN’s contract specified that it was an “INDEPENDENT CONTRACTOR” that would “market, promote and solicit [DISH] orders” on a “non- exclusive basis.”** |
| **Why does DISH work with independent contractors?** | **Working with independent contractors is common, lawful, and good business: It allows one company to leverage other company’s specialized skills and efficiency.** |
| **What does DISH do to make sure that its contractors comply with the law?** | **DISH has a compliance program with dedicated employees who remind retailers of their legal obligations, and who address consumer complaints. DISH works to ensure that its contractors comply with the law, among other reasons, because telemarketing violations damage DISH’s business and brand.** |
| **What did DISH do to make sure that SSN was complying with the law?** | **DISH’s contract with SSN required SSN to comply with the law and made SSN “solely responsible” for doing so.** |
| **Did DISH receive complaints about SSN?** | **From 2006 to May 2010—the four years preceding the class period—DISH received only five complaints about SSN violating the Do Not Call provisions.** |
| **Would receiving five complaints over four years indicate a problem with an independent contractor?** | **As DISH’s compliance manager explained during the trial, a number that low indicates a retailer is generally “following the letter of the law,” and suggests isolated “human error” and “innocent” mistakes rather than systemic disregard of the Do Not Call Registry.** |
| **How did DISH respond to the complaints it received about SSN?** | **DISH investigated each complaint, told SSN to add the person complaining to SSN’s internal Do Not Call list, and reiterated that SSN must comply with telemarketing laws.** |
| **Did DISH receive a complaint about SSN from Thomas Krakauer?** | **Yes. One of the five complaints DISH received about SSN concerned a call to Thomas Krakauer. In 2003, Krakauer had ordered DirecTV service from SSN. By 2009, SSN no longer marketed DirecTV services, and it called Krakauer to persuade him to switch to DISH. But Krakauer had put his phone number on the Do Not Call Registry in the interim.** |
| **What did DISH do when it received the complaint from Krakauer?** | **Krakauer complained to DISH, and DISH promptly investigated. Its investigation revealed SSN had indeed called Krakauer.** |
| **What did DISH do after it learned that SSN had called Krakauer?** | **DISH notified SSN and requested details, including how SSN obtained the number, and when SSN had last “scrubbed” its call list to remove numbers on the Do Not Call Registry.** **DISH told SSN to immediately make sure that Krakauer’s number had been added to SSN’s internal Do Not Call list.** |
| **What else did DISH do to make sure that SSN fixed the problem of calling numbers on the Do Not Call Registry?** | **DISH warned SSN that additional violations could result in disciplinary action, including termination of the Retailer Agreement.** |
| **What was SSN’s response to Krakauer’s complaint about the Do Not Call violation?** | **SSN responded to DISH the next daywith a reasonable explanation: It believed Krakauer’s prior purchase of DirecTV service created an “Established Business Relationship” (EBR) with him. When an EBR exists, a marketer may call a number on the Registry. 47 C.F.R. § 64.1200(f)(14)(ii).** |
| **Did SSN take any action in response to the complaint from Krakauer about the Do Not Call violation?** | **SSN told DISH that it took corrective action: It reviewed the incident with a sales manager and added Krakauer’s number to its internal Do Not Call list. And it told DISH that it always complies with National Do Not Call policies and takes Do Not Call violations very seriously. SSN said it wouldn’t call Krakauer again.** |
| **What did DISH do after completing its investigation about SSN’s call to Krakauer?** | **DISH reported to Krakauer what it had found.** |
| **Did SSN take the corrective action it said it would take after Krakauer’s initial complaint?** | **No. Unbeknownst to DISH, SSN ignored DISH and repeatedly called Krakauer from May 2010 to August 2011.** |
| **Were SSN’s Do Not Call violations limited to calling Krakauer?** | **No. It turned out SSN had been secretly disregarding the Registry. From May 2010 to August 2011, SSN made thousands of calls to numbers on the Registry.** |
| **Why didn’t DISH know about the thousands of calls made by SSN to numbers on the Do Not Call Registry during the class period?** | **Even though SSN had placed more than 1.6 million calls during the class period, DISH didn’t receive a single complaint from an SSN call recipient, including from Krakauer.** |
| **How did this lawsuit begin?** | **In April 2014, Krakauer sued DISH (not SSN) under the TCPA. He purported to represent a class of “[a]ll persons … whose telephone numbers were listed on the [Registry] for at least 30 days, but who received telemarketing calls from [SSN], to promote [DISH] from May 1, 2010 to August 1, 2011.”** |
| **How were class members identified?** | **Krakauer’s expert relied on SSN call records to identify what she said were more than 50,000 calls to residential landlines during the class period to some 20,000 phone numbers on the Registry. Krakauer then relied on private databases that found names associated with the numbers SSN called.** |
| **Why did DISH oppose class certification?** | **DISH argued that the class went beyond the relevant group of people, which were phone *subscribers*. Krakauer didn’t even have subscriber information. Also, the private databases used by Krakauer didn’t show whether named individuals even used the numbers called at the time the calls were made, much less whether they actually *received* telemarketing calls from SSN.** |
| **What was the result of the trial?** | **The class was certified, and a jury trial was held. The jury awarded $400 for each call placed by SSN to the class members, who were not yet identified. That amounted to about $20 million, which the district court then tripled.** |
| **Why did the district court triple the damage award?** | **Treble damages are available only for willful or knowing violations of the TCPA. 47 U.S.C. § 227(c)(5)(C). The court found that SSN’s conduct could be imputed to DISH, and that DISH should have known of TCPA violations that SSN committed before the class period.** |
| **What was the final damages amount awarded by the district court?** | **The court tripled the $400 for each call to $1,200. Because a statutory violation requires a plaintiff to have received two calls, the court awarded each plaintiff at least $2,400—with many set to receive $10,000 and up.** |
| **Had the class members been identified by the time damages were awarded?** | **No. At the time damages were awarded, neither the jury nor the court had determined who received the calls, much less whether they were subscribers. For that reason, the court initially declined to enter judgment.** |
| **How did the court determine who the class members were?** | **Because DISH had not had an opportunity to litigate whether identifiable people received the calls, the court found that DISH was entitled to do so as a matter of fairness and basic due process. The court left those determinations to a claims process.** |
| **Did DISH propose a post-trial claims process?** | **Yes. Although DISH believed no post-trial process could cure the errors from class certification and trial, it nonetheless proposed that each claimant complete a form and submit evidence that the claimant was a subscriber or actually received two or more calls. The court denied DISH’s request.** |
| **What claims process did the court set up?** | **The district court first found that approximately 11,000 class members were sufficiently identified in Krakauer’s records and did not allow DISH to challenge those claims. The identities of the remaining 7,000 class members were established through claim forms. The court then entered an aggregate class judgment.** |
| **What did the claim forms ask?** | **The court’s claim forms did not ask the claimant to identify the telephone subscriber or who answered any call.** |
| **Does this court have jurisdiction to hear this appeal?** | **Plaintiffs have conceded that the district court’s judgment is final under 28 U.S.C. § 1291.** |
| **Didn’t the Supreme Court review an aggregate class judgment under similar circumstances in *Tyson Foods, Inc. v. Bouaphakeo* (S. Ct. 2016)?** | **In *Tyson Foods, Inc. v. Bouaphakeo* (S. Ct. 2016), the Supreme Court affirmed an aggregate class judgment where the damages award had not yet been disbursed and the court had not yet decided how it would be disbursed. AB5.** |
| **Why didn’t DISH assert an affirmative defense under Section 227(c)(5) in this case?** | **AB7, 48–49.** |

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| **Argument I: Class is Overbroad** | **Color:** |
| **Your primary argument is that the class should be decertified. Why?** | **The class is too broad because it includes people who were not harmed, *Messner* (7th Cir. 2012), and there is no way to make sure the damages award goes only to injured class members, *Tyson Foods (S. Ct.* 2016) (Roberts, C.J., concurring).** |
| **Why is the class overbroad?** | **By certifying a class that included anyone merely “associated with” a Registry phone number called by SSN, the class contains thousands of improper plaintiffs who could not possibly state a claim and who lack the actual injury required for Article III standing.** |
| **Why do you argue that the class certified is too broad under the TCPA?** | **By certifying a class that included people called by SSN who were “associated with” a phone number on the Registry, the class includes people with no conceivable claim, such as former boyfriends or girlfriends, and children who have grown up and moved out. It also includes people who suffered no concrete injury—who weren’t subscribers, didn’t answer the phone, or didn’t even hear it ring—and therefore lack standing.** |
| **Who can bring an action under the TCPA?** | **The TCPA creates a private right of action that may be brought by a “telephone subscriber”—the individual who is “responsible for payment of the telephone bill,” 47 C.F.R. § 64.1100(h), and therefore has a statutory right to object to telemarketing calls, *see* 47 C.F.R. § 64.1200(c)(2).** |
| **You rely on the regulations, but what is the statutory language of the TCPA?** | **Under the TCPA, “[a] person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may” bring suit. 47 U.S.C. § 227(c)(5).** |
| **The statute doesn’t refer to telephone “subscribers” at all. Why do you argue that only subscribers can bring a cause of action?** | **Not just anyone can sue. “[A] statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked.” *Lexmark Int’l* (S. Ct. 2014). Thus, a court must ask “whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.” *Id.*** |
| **Was *Lexmark* a TCPA case?** | **No. *Lexmark* (S. Ct. 2014) was a case brought under the Lanham Act for false advertising. [*Lexmark* is explained more below.]** |
| **You cite *Leaf Tobacco* (4th Cir. 1984) to support your “zone of interests” argument. What was the holding in that case?** | **[Explain.]** |
| **How does *In re Peeples* (10th Cir. 2018) support your “zone of interests” argument?** | **[Explain.]** |
| **If someone was at a residence and received more than one phone call from SSN, why aren’t they able to bring a lawsuit?** | **Under Section 227(c) of the TCPA, Congress protected the interests of telephone subscribers who wanted to avoid telemarketing calls. Section 227(c)’s title is “Protection of *subscriber* privacy rights.”** |
| **Where does the TCPA say that only subscribers can sue for telemarketing violations?** | **Section 227(c)’s title is “Protection of *subscriber* privacy rights.” And Section 227(c)’s first sentence instructs the FCC to prescribe regulations “to protect *residential telephone subscribers’* privacy rights to avoid receiving telephone solicitations to which they object.”** |
| **Who can be listed on the Do Not Call Registry?** | **The Do Not Call Registry is defined as a “database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations.” 47 U.S.C.§ 227(c)(3).** |
| **Explain why only subscribers can bring a claim when the statute uses “person” and not “subscriber.”** | **Congress tied the cause of action to subscribers. A claim under § 227(c)(5) requires an underlying “violation of the regulations prescribed under this subsection.” And the relevant regulation concerns subscribers. It is subscribers who can place their numbers on the Registry, and the regulation prohibits calls to a “residential telephone subscriber who has registered his or her telephone number” on the Registry. 47 C.F.R. § 64.1200(c)(2).** |
| **What other support do you have for your argument that only subscribers are protected under the TCPA?** | **Even before the Do Not Call Registry was created, the regulation allowed only a “subscriber” to object to receiving calls by placing their number on companies’ internal Do Not Call lists. 47 C.F.R. § 64.1200(e) (1993).** |
| **What injury does Section 227(c) seek to redress?** | **Section 227(c) seeks to compensate the injury from unwanted telemarketing calls to “residential subscribers who object to receiving telephone solicitations,” 47 U.S.C. § 227(c)(3)—in other words, the harm to someone who affirmatively took action to prevent such calls.** |
| **Are people who answer calls, but aren’t subscribers, injured?** | **People who merely answer calls—a houseguest or a subscriber’s son visiting from college—are not injured in the relevant way and have no claim based on calls to the subscriber’s number.** |
| **What is the risk of allowing anyone answering calls to sue?** | **If anyone answering calls could sue, it would create multiple claimants for each telemarketing violation. This could create a race to judgment among eligible plaintiffs and risk double recovery against the defendant. Congress could not have intended this result.** |
| **What did the district court decide regarding who could bring a claim under the TCPA?** | **The district court held that Section 227(c)(5) is not limited to only subscribers. It certified a class that encompassed any person “associated with” a phone number on the Registry.** |
| **What was the district court’s reasoning for finding that non-subscribers could sue?** | **The district court said that while Section 227(c)(1) – (3) all concern subscribers registering their numbers, Section 227(c)(5) does not explicitly refer to subscribers. It refers to a “a person who has received” calls.** |
| **Why did the district court err by allowing non-subscribers to recover under the TCPA?** | **The court’s reasoning cannot be squared with the statutory text, which states that the “person” must suffer a “violation of the regulations prescribed under this subsection.” And the implementing regulations, from their inception, have concerned the rights of subscribers who object to calls by placing their names on a Registry.** |
| **You cite *Lexmark* to support your argument that the district court erred. What was that case about?** | **The plaintiff in *Lexmark* (S. Ct. 2014) sought to sue under the Lanham Act for false advertising, alleging that a misleading ad duped her into purchasing a disappointing product. Much like here, the statute provided that “*any person* who believes that he or she is likely to be damaged” could sue. Although that broad language might suggest that an action is available to anyone, the Court explained that the claim is available only to those Congress intended to protect—individuals suffering commercial harm to their reputation or sales.** |
| **How does *Lexmark* help you here?** | ***Lexmark* instructs that claims are only available to those Congress intended to protect. Under the TCPA, Congress intended to protect the subscriber whose desire to avoid telemarketing calls was ignored.** |
| **You argue that the district court was wrong to rely on cases interpreting Section 227(b)(3). Why is that?** | **Section 227(b)(3) creates a cause of action for “robocalls,” and some district courts have thought it available to any robocall recipient. But “each provision of the [statute] must be analyzed individually to determine who falls within the scope of its protection.” *Todd v. Collecto* (7th Cir. 2013).** |
| **How is Section 227(b) different from Section 227(c)?** | **Section 227(b) covers any robocall to any residential telephone line, makes no reference to residential subscribers or the Registry, and doesn’t require people to take action to stop receiving robocalls. Section 227(b) was enacted through separate legislation and addresses a “different harm[]” governed by “a different set of rules.” *Donaca v. DISH Network* (D. Colo. 2014).** |
| **Explain why the district court was wrong to include all people associated with a residential number.** | **The court’s “associated with” class necessarily included non-subscribers because multiple people often are “associated with” a phone number.** |
| **How were class members identified?** | **The court identified class membership on records from Five9, a vender that provided telemarketing software to SSN. But those records don’t show whether a person was the subscriber. And many of the numbers in those records are associated with multiple names—only one of which could be the subscriber.** |
| **Did the court rely on any other information besides Five9?** | **When the Five9 data didn’t supply a name, the court relied on a LexisNexis database, which also doesn’t identify subscribers.** |
| **How did the LexisNexis database identify people associated with residential phone numbers?** | **LexisNexis records could come from thousands of different sources, including credit card applications, utilities, and warranties. Whenever anyone listed the subscriber’s phone number, that person would be “associated with” the number.** |
| **How else were people associated with numbers called by SSN identified?** | **For thousands of numbers called by SSN, *anyone* could attempt to self-verify their “association with” the number using a website (www.dishclassaction.com), without showing they were the subscriber. Even Krakauer’s class notice didn’t require people to confirm they were subscribers.** |
| **You argue that the class definition includes people who lack Article III standing. Please explain.** | **The broad class certified here runs afoul of Article III because it includes people who suffered no concrete injury.** |
| **What does Article III require for standing?** | **“[A]t an irreducible minimum, Art. III requires the party who invokes the court’s authority to show that he personally has suffered some *actual or threatened injury* as a result of the putatively illegal conduct of the defendant.” *Valley Forge Christian Coll.* (S. Ct. 1982).** |
| **Does Article III require individuals to show actual or threatened injury, even in class actions?** | **Yes, this fundamental principle holds equally true in class actions. *Halvorson v. Auto-Owners Ins. Co.* (8th Cir. 2013).** |
| **Does Article III require concrete injury when there is a statutory violation?** | **Yes, because the fact of a statutory violation does not necessarily establish actualinjury. *Soehnlen v. Fleet Owners Ins. Fund* (6th Cir. 2016); *Groshek v. Time Warner Cable* (7th Cir. 2017).** |
| **How do courts determine whether plaintiffs were injured under the TCPA?** | **Courts have examined whether plaintiffs were injured in some concrete way: (1), because they were unable to use a phone line, *Mey v. Got Warranty* (N.D. W. Va. 2016); (2) because of “aggravation” caused by an intrusion on privacy, *Van Patten v. Vertical Fitness Grp.* (9th Cir. 2017); (3) or because they incurred actual costs, *Florence Endocrine Clinic* (11th Cir. 2017). This makes sense—a phone ringing in an empty house creates no injury.** |
| **Was injury shown in this case?** | **No. The court acknowledged that members of the certified class did not necessarily pick up or hear ringing every call at issue in this case. But the court found standing based on some *past* *risk* of an injury to privacy. That was legal error.** |
| **Can *risk* of injury establish standing?** | **“Risk of injury” can sometimes establish standing when a plaintiff complains of threatened *future* harm. *See Clapper v. Amnesty Int’l USA* (S. Ct. 2013); *O’Shea v. Littleton* (S. Ct. 1974). But when a plaintiff seeks relief for alleged *past* harm, the *risk* that such harm might have happened is irrelevant.** |
| **What kind of injury was required in *Clapper* *v. Amnesty Int’l USA* (S. Ct. 2013)?** | **In *Clapper* *v. Amnesty Int’l USA* (2013), the Supreme Court required a non-speculative risk of injury that is “certainly impending.”** |
| **What did *O’Shea v. Littleton* (S. Ct. 1974) require for standing?** | **In *O’Shea* *v. Littleton* (S. Ct. 1974), the Supreme Court stated: “It must be alleged that the plaintiff has sustained or is immediately in danger of sustaining some direct injury.”** |
| **Why is the *risk* of harm irrelevant when a plaintiff seeks relief for *past* harm?** | **It amounts to saying, “I could have been hurt (even though I wasn’t).” If the harm didn’t occur, there’s no injury. *See generally Summers v. Earth Island Inst.* (S. Ct. 2009).** |
| **What did the Supreme Court say about standing in *Summers v. Earth Island Inst.* (S. Ct. 2009)?** | **In *Summers v. Earth Island Inst.* (S Ct. 2009), the Supreme Court explained: “Standing … is not an ingenious academic exercise in the conceivable** **but requires a factual showing of perceptible harm.” The district court’s contrary rule would nullify the requirement of injury in fact.** |
| **You argue that the class was overbroad. How so?** | **A class that includes non-subscribers includes members who have no cause of action. And by certifying a class of everyone “associated with” a phone number, the class includes members who suffered no injury and lack standing.** |
| **What did the court hold in *Messner v. Northshore Univ. HealthSystems* (7th Cir. 2012)?** | **In *Messner v. Northshore Univ. HealthSystems* (7th Cir. 2012), the court explained that a class “defined so broadly as to include a great number of members who for some reason could not have been harmed … is defined too broadly to permit certification.”** |
| **What did the court hold in *Walker v. Consolidated Freightways* (4th Cir. 1991).** | **A class cannot be certified when it includes individuals who have no claim and “lack standing to sue.” *Walker v. Consolidated Freightways* (4th Cir. 1991).** |
| **You cite *Walewski v. Zenimax Media*, an unpublished case from the 11th Circuit (11th Cir. 2012). How is that relevant?** | **In *Walewski* *v. Zenimax Media* (11th Cir. 2012), the 11th Circuit stated that a class that includes non-subscribers “impermissibly includes members who have no cause of action as a matter of law.”** |
| **What did the court hold in *Denney v. Deutsche Bank* (2d Cir. 2006)?** | **A class cannot be “defined in such a way” that it necessarily embraces people who “lack standing.” *Denney v. Deutsche Bank* (2d Cir. 2006).** |
| **What did the court hold in *Kohen v. Pacific Investment Mgmt. Co.* (7th Cir. 2009)?** | **It is improper to certify a class “if the definition is so broad that it sweeps within it persons who could not have been injured by the defendant’s conduct.” *Kohen v. Pacific Investment Mgmt. Co.* (7th Cir. 2009).** |
| **You say that the class must be decertified because there is no administratively feasible mechanism to limit recovery to proper plaintiffs. What do you mean?** | **For certification to be proper, a plaintiff must be able to prove that all class members were in fact injured. The plaintiff must identify a way to exclude uninjured class members that is (1) administratively feasible, and (2) protects defendants’ Seventh Amendment and due process rights. *In re Nexium Antitrust Litig.* (1st Cir. 2015).** |
| **What happened in *EQT Production Co. v. Adair* (4th Cir. 2014)?** | **In *EQT Production Co. v. Adair*, the 4th Circuit explained that it must be administratively feasible for the court to determine whether an individual is a class member.** |
| **How did Krakauer prove injury here?** | **Krakauer only sought to prove that SSN called certain *numbers*, not that any apparent class member was the affected subscriber, much less received calls or somehow suffered harm.** |
| **How did Krakauer find numbers called by SSN?** | **Krakauer’s case was built on lists of SSN’s sales leads, which reflected numbers SSN *wanted* to call. He narrowed those lists to numbers on the Do Not Call Registry. Where the records listed no names, he cross-referenced numbers against records in commercial databases (like LexisNexis) that purport to match people with phone numbers.** |
| **Do the databases used by Krakauer identify DISH subscribers?** | **No. The databases used by Krakauer don’t identify subscribers. Each record could come from thousands of sources, like credit card applications, utilities, or warranties.** |
| **Did Krakauer have a way to establish who was injured?** | **No. The lists of people “associated with” phone numbers didn’t show who picked up the phone, who was home when the phone rang, or even that class members lived at the residence at the time of the call.** |
| **You argue that the court erred because it failed to limit the judgment to those who prove liability. Please explain.** | **Even when a class has been properly certified, there must be some “way to ensure that the jury’s damages award goes only to injured class members.” *Tyson Foods* *(S. Ct.* 2016) (Roberts, C.J., concurring). At trial, Krakauer never showed that any class member (other than himself) was a subscriber, answered a phone call, heard the phone ring, or was otherwise injured. And the jury made no such finding.** |
| **What did the court instruct the jury about liability?** | **The court instructed the jury that it could enter judgment if it found that SSN made at least two solicitation calls to *numbers* on the Do Not Call list.** |
| **Why was it wrong to instruct the jury that it could enter judgment if it found that SSN made at least two calls to numbers on the Do Not Call list?** | **Showing two calls to a given phone *number* doesn’t weed out valid from invalid claims. Imagine two calls to the Doe household; John Doe (the subscriber) answered the first and Jane Doe (home from college) answered the second. The jury wouldn’t know—it would only know that two calls were made to a given number.** |
| **How did the court identify class members from SSN’s records?** | **The court identified 11,000 members based on Krakauer’s records, which mentioned their names. But these records only showed names of people “associated with” phone numbers. These people never attested that they were subscribers or actually received the calls.** |
| **Is there any evidence that claimants were incorrectly identified?** | **Yes, in some cases, the court awarded damages based on Krakauer’s records, but LexisNexis showed different people associated with the same phone number during the class period.** |
| **Do you know how many people were incorrectly awarded damages? Your brief only cites two examples (OB36).** | **We’re not sure how many total claimants were incorrectly identified as being associated with a phone number, but the district court refused to consider the conflicting evidence we did put forward.** |
| **How were the other 7,000 class members identified?** | **For the remaining 7,000 class members, the court required a claim form, but the form only asked whether “you or someone in your household ha[d] this telephone number” during the class period.** |
| **What was wrong with the claim form used to identify the 7,000 class members?** | **The claim form didn’t ask the claimant (1) who in the household had the number, (2) who answered any call, or (3) whether the household had the number during the class period or when the calls were made. The claim form therefore allowed a claim from anyone who lived in a household with someone who had the phone number at some point during the class period.** |
| **What was the result of the district court’s claim process?** | **The jury found in favor of over 18,000 claimants—and awarded tens of millions of dollars—without finding that a single identifiable individual other than Krakauer was a telephone subscriber or had Article III standing.** |
| **What were the objections of DISH’s expert to the class members identified through plaintiffs’ process?** | **DISH’s expert found 3,644 name inconsistencies within the class of 18,066 members. She then found that 96% of the people had a name inconsistency.** |
| **What was the basis for the district court’s statement that DISH was not acting in good faith during the class member identification process?** | **[Explain.]** |
| **Is it your position that the special master process was not sufficient to identify class members?** | **DISH only objected to 350 individual claims of those who submitted claim forms. AB24. Of the 7,000 claimants who needed to confirm their status as class members by submitting a claims form, 2,021 submitted claim forms, and Dish did not object to the validity of over 80% (1,645 claims in all). AB23.** |
| **What is the standard of review for class certification?** | **Abuse of discretion. *Brown v. Nucor Corp.* (4th Cir. 2015). AB25.** |
| **Where in the text of the TCPA does it say that only a “subscriber” can bring suit?** | **Section 227(c)(5) authorizes a lawsuit only to enforce “violation[s] of the regulations prescribed *under this* *subsection*”—that is, under § 227(c). And Krakauer admits (AB32) that the “violation” those regulations define is for “initiat[ing] any telephone solicitation” to a “residential telephone *subscriber* who has registered his or her number.” 47 C.F.R. § 64.1200(c).** |
| **Why did Congress pass the TCPA?** | **“Voluminous consumer complaints about abuses of telephone technology”— particularly unsolicited telemarketing calls to their homes—“prompted Congress to pass the TCPA” in 1991. *Mims v. Arrow Fin. Servs., LLC*, (S. Ct. 2012).** |
| **What is the National Do Not Call Registry?** | **The TCPA authorizes a national database of phone numbers that are excluded from telemarketing calls, which is named the National Do Not Call Registry.** |
| **Who is liable for calls made to numbers on the National Do Not Call Registry?** | **The “person or entity making telephone solicitations (or on whose behalf telephone solicitations are made)” may be liable for do-not-call violations. 47 C.F.R. § 64.1200(c)(2).** |
| **Plaintiffs argue that the text of the TCPA allows suit by any “person who has received” multiple unlawful calls. Why do you argue that “person” must mean “subscriber”?** | **Congress did not mean any “person.” Congress intended a subset of “persons.” Section 227(c) and its regulations protect subscribers. As *Lexmark Int’l v. Static Control* Components (S. Ct. 2014) teaches, a statute’s use of the word “person” is not dispositive.** |
| **What does the text of Section 227(c)(5) say?** | **“A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may” sue “to receive up to $500 in damages for each such violation.” 47 U.S.C. § 227(c)(5).** |
| **Plaintiffs argue that the word “subscriber” is nowhere to be found in the statute. AB32. Are they correct?** | **No. The word “subscriber” is in the title of § 227(c), which establishes a regime to “Protect[] *Subscriber* Privacy Rights.” And it’s in the substantive provisions defining the “violation” that § 227(c)(5) enforces. The word “subscriber” was also used in Congress’s description of the problem: “the need to protect residential telephone *subscribers’* privacy rights.” § 227(c)(1); *accord* § 227(c)(3).** |
| **Wouldn’t Congress have used “subscriber” in Section 227(c)(5) if it intended it only to apply to subscribers? AB28.** | **Address the rule that, when a statute “has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea.” Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012); *see, e.g.*, *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (“[U]sually at least, when we’re engaged in the business of interpreting statutes we presume differences in language like this convey differences in meaning.”). AB28.** |
| **What is *Lexmark*’s “zone of interests” test?** | **In *Lexmark Int’l v. Static Control Components, Inc.* (S. Ct. 2014), the Supreme Court explained that “[w]hether a plaintiff comes within the ‘zone of interests’ is an issue that requires [courts] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”** |
| **You rely on the context of the TCPA, which refers to “subscribers” several times. But doesn’t the plain text of Section 227(c)(5) refer to persons, not subscribers?** | **Congress tied the cause of action to subscribers. A claim under § 227(c)(5) requires an underlying “violation of the regulations prescribed under this subsection.” And the relevant regulation concerns subscribers; it is subscribers who can place their numbers on the Registry, and the regulation prohibits calls to a “residential telephone subscriber who has registered his or her telephone number” on the Registry. 47 C.F.R. § 64.1200(c)(2).** |
| **What did this Court say about statutory interpretation in *Belmora v. Bayer Consumer Care* (4th Cir. 2016)?** | **[Explain.]** |
| **Even if we accepted your “zone of interests” argument, why would only subscribers fall within that zone?** | **In *Lexmark Int’l v. Static Control Components, Inc.* (S. Ct. 2014), the Court explained that claims are available only to those Congress intended to protect.** |
| **Why aren’t recipients of unwanted telemarking calls *arguably* within the zone of interests that Congress was trying to protect?** | **Under *Lexmark Int’l* (S. Ct. 2014), the proper inquiry is what interests *actually* (not arguably) are protected by Section 227(c), and whether non-subscribers come within that zone of interests.** |
| **Plaintiffs cite a several cases stating that the “zone of interests” test is not meant to be especially demanding, and that plaintiffs only need to show that the interests they seek to vindicate are *arguably* within the zone of interests that the statute protects. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* (S. Ct. 2012); *Bank of Am. Corp. v. City of Miami* (S. Ct. 2017).** | **The cases cited by plaintiffs show that this more “lenient approach” applies only to Administrative Procedure Act suits—because of that statute’s uniquely strong presumption of judicial review—and to statutes incorporating the APA’s “aggrieved person” language.** |
| **Didn’t Congress pass the TCPA because of public outrage over intrusive, nuisance calls to their homes from telemarketers? And didn’t Congress describe the people harmed by such calls as receiving parties, consumers, and individuals? AB31.** | **Yes, the TCPA was passed because of intrusive calls to people’s homes from telemarketers. But, that doesn’t mean that Congress intended for anyone receiving such calls to have a private right of action. AB31.** |
| **Wouldn’t any recipients suffer the harms of intrusive telemarketing calls just as much as subscribers?** | **Perhaps. The** **Do Not Call provisions protect those who affirmatively take action to prevent calls, which must be subscribers.** |
| **Aren’t you asking us to read an atextual subscribers-only restriction into Section 227(c)(5)? That section says “person” not “subscriber.”** | **The regulations implementing the statute are directly relevant, because Section 227(c)(5) authorizes a lawsuit only to enforce “violation[s] of the regulations prescribed *under this* *subsection*”—that is, under § 227(c). And the “violation” those regulations define is for “initiat[ing] any telephone solicitation” to a “residential telephone *subscriber* who has registered his or her number.” 47 C.F.R. § 64.1200(c). It is the *subscriber’s* expressed interest in avoiding calls that Congress cared about, and thus the subscriber who may sue.** |
| **Didn’t the Third Circuit in *Leyse v. Bank of Am. Nat’l Ass’n* (3d Cir. 2015) hold that the TCPA’s zone of interests encompass the actual recipients of the calls even if they were not subscribers or the intended recipients?** | **First, *Leyse v. Bank of Am. Nat’l Ass’n* (3d Cir. 2015) was a robocalling case about Section 227(b), not a telemarketing case under Section 227(c). Moreover, the court in *Leyse* explained that to define the zone of interests protected by the TCPA, it makes sense to look at what prohibitions the private action is intended to enforce. Under Section 227(c), those prohibitions are all about subscribers.** |
| **Why didn’t you discuss *Leyse v. Bank of Am. Nat’l Ass’n* (3d Cir. 2015) in your opening brief? Wasn’t it the only appellate decision analyzing the TCPA’s zone of interests under *Lexmark*?** | ***Leyse* is a robocalling case about Section 227(b)—where, unlike in Section 227(c), the word “subscriber” is nowhere to be found.** |
| **Is DISH arguing that only the *intended* recipient of the call is within the TCPA’s zone of interests, not the actual recipient? AB32.** | **No. DISH is arguing that only *subscribers* are within Section 227(c)’s zone of interests, and only subscribers with numbers on the Do Not Call Registry who actually receive calls can bring suit under Section 227(c). AB32.** |
| **Didn’t the Third Circuit in *Leyse v. Bank of Am. Nat’l Ass’n* (3d Cir. 2015) reject the idea that only intended recipients are within the TCPA’s zone of interests?** | ***Leyse* is distinguishable because it dealt with robocalls. Section 227(b) bans *all* robocalls to residential phone lines, thus creating a broad legally protected interest in avoiding robocalls. Section 227(c), on the other hand, prohibits live telemarketing calls only after a subscriber has placed her number on the Do Not Call Registry.** |
| **You point out the differences between the TCPA’s robocalling prohibition in Section 227(b) and the telemarketing prohibition in Section 227(c). Please explain.** | **Sections 227(b) and 227(c) are fundamentally different, and so are their zones of interests. Section 227(b) bans *all robocalls* to residential phone lines, which creates a broad legally protected interest in avoiding robocalls. But the Do Not Call provisions prohibit *live* calls only after a *subscriber* has placed her number on the Registry, thereby creating a legally protected interest only for subscribers who affirmatively object to live telemarketing calls.** |
| **Didn’t the FCC reject the idea that only intended recipients are within the TCPA’s zone of interests?** | **The FCC decision that Krakauer cites concerns consumers’ rights to stop unwanted *robocalls* under Section 227(b), not live telemarketing calls under Section 227(c). *In the Matter of Rules and Regulations Implementing the TCPA*, 30 FCC Rcd. 7961, 7964 (2015).** |
| **Wasn’t *Lexmark Int’l* (S. Ct. 2014) about *what kind of injury* can support the suit? AB34.** | ***Lexmark Int’l* (S. Ct. 2014) concerned a statutory provision in the Lanham Act, which authorizes suit by “any person who believes that he or she is likely to be damaged.” No particular kind of harm was specified in the text. The Supreme Court held that the statute protects only commercial harm, not all harm imaginable. AB34.** |
| **Isn’t the TCPA much clearer about the kind of harm required (more than one call) than the Lanham Act (which didn’t specify the harm at all)?** | **[Explain.]** |
| **What was your basis for opposing class certification?** | **DISH opposed certification of a class of “people … who received telemarketing calls,” because there was no way to reliably ascertain which people received these calls without individualized fact finding.** |
| **Are you arguing that the *method* of determining who satisfied the class definition was wrong? Or are you arguing that the *class definition* itself was wrong? AB34.** | **Both were wrong. The class definition was wrong because it was too broad (because it included non-subscribers), and the court then interpreted the definition as including everyone “associated with” a relevant phone number. And the method was wrong because Krakauer’s plan for ascertaining class membership relied on database entries that did not even show who the subscribers were (let alone who received a call, as the class definition seemed to require). AB34.** |
| **Did you preserve your class certification arguments at the class certification stage? AB34.** | **Krakauer argues that DISH raised the argument after final judgment (OB34-37), not in opposition to class certification or the jury verdict. AB34.** |
| **If we credit your reading of Section 227(c)(5) and decide that only subscribers should be included in the class, what is the remedy?** | **[Explain.]** |
| **Why do you argue that plaintiffs lack Article III standing?** | **The class here runs afoul of Article III because it includes people who suffered no concrete injury. The certified class includes non-subscribers who never received an unsolicited marketing call. The district court explicitly held that “class members did not necessarily pick up or hear ringing every call at issue in this case.”** |
| **Is receiving repeated unsolicited telemarketing calls a concrete injury?** | **[Explain.]** |
| **What does *Spokeo, Inc. v. Robins* (S. Ct. 2016) say about standing?** | **[Explain.]** |
| **Didn’t plaintiffs suffer the classic intangible injuries of invasion of privacy and nuisance?** | **We don’t know. We agree with Krakauer that the district court *should have* required him to prove that “all class members … received multiple unlawful calls.” AB35. But the class definition didn’t actually require this. Krakauer has presented no way to identify those people, and he points to no proof that any class member besides him (much less all of them) received any call.** |
| **Are the injuries of invasion of privacy and nuisance sufficiently concrete for Article III standing?** | **[Explain.]** |
| **You cite *In re Asacol Antitrust Litig.* (1st Cir. 2018) in your reply brief. What is that case about?** | ***In re Asacol* was a putative class action alleging that a company wrongfully blocked a generic drug from the market. Even though the district court found that 10% of the class was uninjured because they never would have switched to the generic, it still certified the class, finding the number of uninjured class members “de minimis,” and reasoning that plaintiffs could remove uninjured persons from the class during claims administration. The First Circuit reversed because numerous potential class members suffered no injury, and plaintiffs identified no way to exclude them that was both administratively feasible and protected defendants’ Seventh Amendment and due process rights.** |
| **Didn’t Krakauer’s expert ensure that all class members were at least regular users of a phone number? AB34n.1.** | **No, which is why Krakauer offers no record cite for this assertion. Krakauer’s expert never claimed to do this, nor could she have based on records that she conceded show only who was “associated with” a number. JA\_\_[Doc48-2at12; Doc103at130].** |
| **Didn’t the district court require claims forms for thousands of people?** | **The district court did require claims forms for 7,000 of 18,000 people. The other 11,000 were admitted to the class based on Krakauer’s “associated with” standard. But the claims forms didn’t ask whether people were subscribers or received calls.** |
| **Didn’t the claims form ask for documentation that claimants, or their household, paid for or used the phone number. AB34 n.1.** | **No. The claim form requires nodocumentation, and fewer than 200 people have submitted it.** |
| **Krakauer asserts that the potential for duplicative claims hasn’t been a problem in practice. AB41. Is that correct?** | **[Explain.] The problem isn’t merely duplicative claims. It is the high likelihood that Krakauer’s “associated with” approach identified and permitted recovery for the wrong plaintiffs. We identified two obvious examples in our opening brief (OB36), which Krakauer does not refute.** |
| **Doesn’t Congress have the power to create standing?** | **Congress is empowered “to identify intangible harms that meet minimum Article III requirements,” even if those harms “were previously inadequate in law.” *Spokeo* (S. Ct. 2016). “In exercising this power, however, Congress must at least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring the suit.” *Massachusetts v. EPA* (S. Ct. 2007). If it does so, any plaintiff in that class has standing and “need not allege any *additional* harm beyond the one Congress has identified.” *Spokeo* (S. Ct. 2016).** |
| **Are you arguing that plaintiffs must show additional injury beyond receiving two unsolicited telemarking calls? AB35.** | **No. Subscribers who registered their numbers on the Do Not Call list and received two or more calls from SSN during the class period don’t need to show any additional injury. AB35.** |
| **Doesn’t *Susinno v. Work Out World Inc.* (3d Cir. 2017) support plaintiffs’ standing in this case?** | **From Krakauer’s brief: *Susinno v. Work Out World* (3d Cir. 2017)involved a plaintiff who received an unsolicited call from a telemarketer. She did not answer the call, so the company left a message. The Third Circuit held that she had standing. Pointing to the congressional findings in support of the TCPA, which showed that Congress sought to prevent the** **nuisance and invasion of privacy caused by telemarketing calls, the court concluded that “Congress squarely identified this injury” as cognizable. AB37–38.** |
| **Doesn’t *Van Patten v. Vertical Fitness Group, LLC* (9th Cir. 2017) support plaintiffs’ standing in this case? AB38.** | **From Krakauer’s brief: In *Van Patten v. Vertical Fitness Group* (9th Cir. 2017), the Ninth Circuit held that a plaintiff who received text-message solicitations had standing. As *Spokeo* commands, the court looked to both history and Congress. It noted that “[a]ctions to remedy defendants’ invasions of privacy, intrusion upon seclusion, and nuisance have long been heard by American courts.” And it explained that Congress “sought to protect consumers from the unwanted intrusion and nuisance of unsolicited telemarketing phone calls and fax[es].” AB38.** |
| **You argue that unanswered calls create no injury. OB20-30. But, weren’t all unanswered calls screened out in this case? AB39.** | **[Explain.]** |
| **Why did you wait two years to raise your standing argument in the district court?** | **[Explain.]** |
| **Is it your position that receiving telemarketing calls is not a concrete injury?** | **[Explain.]** |
| **You argue that claimants may have invalid claims because phone numbers change hands. But couldn’t any problems with the phone numbers be addressed in the claims process?** | **No, because Krakauer introduced no evidence that anyone else besides him received two calls.** |
| **Is the post-trial claims process at issue in this appeal? AB41.** | **[Explain.]** |
| **Hasn’t the district court put safeguards in place to address DISH’s concerns about multiple people submitting claims for calls to a single number? AB41; OB39.** | **From Krakauer’s brief: The district court has required claims forms for thousands of people and allowed Dish to object to the validity of any such claim, with a special master resolving any disputes in the first instance. Duplicative claims have been submitted for Dr. Krakauer’s number and those claims have been screened out as fraudulent. Also, recognizing that numbers can change hands, the claims form determined the period over which the claimant used the number and received the calls. AB41–42.** |
| **If DISH thinks that claimants haven’t satisfied the class definition, can’t DISH object to the validity of those claims during the claims process? AB42.** | **No. The court entered judgment for a class of 18,000 people defined by being “associated with” a number, without demanding proof of anything more. The class is overbroad and must be decertified. AB42.** |
| **Why wasn’t it appropriate to rely on SSN’s call records for certification? The records identified 20,450 phone numbers that (a) were on the registry, and (b) received two or more connected calls in a 12-month period during the relevant time?** | **Those call records only show that a call was connected, not who answered the call. Nor do they specify whether the person who answered the call was a subscriber.** |
| **Argument II: Jury not instructed that class members must receive two calls** | **Color:** |
| **What must the plaintiff prove under the TCPA?** | **Under the TCPA, a plaintiff must prove she “received more than one telephone call within any 12-month period.” 47 U.S.C. § 227(c)(5).** |
| **What did the Sixth Circuit hold in *Charvat v. NMP* (6th Cir. 2011)?** | **In *Charvat v. NMP* (6th Cir. 2011), the Sixth Circuit described the “threshold requirement” of proving liability under the TCPA. There must be (1) a relevant “person” who (2) “received more than one telephone call” (3) “within any 12-month period.”** |
| **How can a plaintiff prove liability under the TCPA?** | **In an individual action, a plaintiff might use a phone bill to show that she was the subscriber, and call records or testimony to show she received two calls within a year.** |
| **What instructions did the court give the jury about proving liability under the TCPA?** | **Over DISH’s objection, the court removed any issues about whether phone numbers were associated with certain people. Thus, liability could be established if SSN merely called the same number twice, regardless of whether a single person received both calls.** |
| **What the court tell the jury it needed to find for liability?** | **The court told the jury that its job was to decide whether SSN made at least two solicitation calls numbers on the Do Not Call list. For example, the court stated: “Dr. Krakauer does not have to prove here whether names or addresses match up with phone numbers.… Krakauer must prove … that … SSN called the number at least twice during any 12-month period.”** |
| **Why was it incorrect to charge the jury with finding two calls by SSN to numbers on the Do Not Call list?** | **The problem is that two calls to the *same number* is not the same thing as two calls received by the *same person*. That’s because, among other reasons, phone numbers change hands. A call placed to a number in January wouldn’t necessarily be received by the same person as a call placed to the same number in October if the original recipient moved or canceled their landline.** |
| **What is the standard of review for jury instructions?** | **The court reviews jury instructions de novo. *United States v. Mouzone* (4th Cir. 2012).** |
| **What is the standard of review for jury instructions?** | **From Krakauer’s brief: “The test for the adequacy of jury instructions is whether the jury charge, construed as a whole, adequately states the controlling legal principle without misleading or confusing the jury.” *Chaudhry v. Gallezer* (4th Cir. 1999). AB26.** |
| **How did the court’s instruction about finding two calls to numbers on the Do Not Call list affect the verdict?** | **No evidence was presented at trial that could have supported liability.** |
| **What did Krakauer prove at trial?** | **Krakauer’s sole proof at trial was a list of phone numbers that SSN had called. But Krakauer introduced no evidence and made no argument that the phone numbers didn’t change hands, or that any person (apart from himself) received both calls.** |
| **What is required to vacate a jury verdict?** | **Vacatur requires “a reasonable probability that the erroneous instruction affected the jury’s verdict.” *BMG Rights Mgmt. v. Cox Commc’ns* (4th Cir. 2018).** |
| **What happened in *Palmetto State Med. Ctr. v. Operation Lifeline* (4th Cir. 1997)?** | **In *Palmetto State Med. Ctr. v. Operation Lifeline* (4th Cir. 1997, the 4th Circuit reversed the judgments where the court issued erroneous instructions and “no evidence was presented” that could have supported liability.** |
| **How were the jury instructions wrong?** | **The jury instructions told the jury that two calls to the same *phone number* establishes the statutory requirement of two calls to the *same person*.** |
| **If the jury was instructed incorrectly, what is the standard for setting aside the verdict?** | **“Even if a jury was erroneously instructed,” this Court “will not set aside a resulting verdict unless the erroneous instruction seriously prejudiced the challenging party’s case.” *Gentry v. E. W. Partners Club Mgmt. Co.* (4th Cir. 2016). AB26.** |
| **What was the jury asked to determine in this case?** | **The jury was asked to determine: (1) whether SSN was acting as DISH’s agent when it made the calls; (2) whether SSN made and class members received at least two telephone solicitations to a residential number in any 12-month period by or on behalf of DISH, when their telephone numbers were on the National Do Not Call Registry; and (3) if the answer to both questions was yes, the amount per violation (from zero to $500 per call).** |
| **You argue that the jury instructions were erroneous. Are you challenging the verdict form on appeal? AB40.** | **[Explain.]** |
| **How did the district court err by instructing that “[t]here is no issue for you to decide in connection with names and addresses or the identities of class members. That is something that may be decided down the road in other proceedings”?** | **The TCPA requires each class member to prove, as an element, that she “received more than one telephone call within any 12-month period.” It was therefore improper to remove from trial any issues as to whether a particular phone number was associated with a particular person, and to forbid the jury from considering whether any particular person received multiple calls.** |
| **Why didn’t the district court have discretion to reserve class-membership questions for the claims process and removing all “identity” issues from the trial?** | **The two-call requirement is not a class-membership question—it is an element of the claim. Krakauer does not explain how he could have shown that any single person received two calls without providing evidence of that person’s identity.** |
| **How should the district court have instructed the jury regarding class membership?** | **The district court should have instructed the jury that Krakauer needed to prove that each class member received more than one telephone call during the class period. These are the instructions DISH proposed.** |
| **How did the district court err by instructing the jury to decide whether SSN made at least two solicitation calls to numbers on the Do Not Call list?** | **By equating calls to a *number* with calls to a *person*, the court instructed the jury that Krakauer’s evidence about phone numbers was sufficient, that it should ignore the fact that multiple people in a household could answer the phone, and that it should disregard expert testimony that people change phone numbers with significant frequency in the United States. That mattered, because Krakauer introduced no evidence that anyone (besides himself) received two calls.** |
| **Argument III: No reasonable jury could find DISH liable for SSN’s calls** | **Color:** |
| **Why do you argue that DISH was the wrong defendant?** | **The court erroneously permitted the jury to hold DISH liable for SSN’s misdeeds. SSN was not DISH’s agent.** |
| **Is the question of agency a factual or legal question?** | **Here, because the facts about the relationship between DISH and SSN are not meaningfully in dispute, it is a “question of law” whether those facts gave rise to an agency relationship. *Cilecek v. Inova Health Sys. Servs.*, (4th Cir. 1997).** |
| **What did Krakauer need to prove for DISH to be vicariously liable for SSN’s calls?** | **For DISH to be vicariously liable for SSN’s calls, Krakauer needed to prove (1) that DISH authorized SSN to act as its agent, and (2) that SSN acted within the scope of that authority when it made calls violating the TCPA.** |
| **Did DISH authorize SSN to act as its agent?** | **No. The contracts between DISH and SSN expressly withheld actual authority, and DISH did not have the day-to-day control necessary to create agency.** |
| **What is an agency relationship?** | **“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests *assent* to another person (an ‘agent’) *that the agent shall act on the principal’s behalf and subject to the principal’s control*, and the agent manifests assent or otherwise consents so to act.” Restatement (Third) of Agency § 1.01 (emphasis added).** |
| **What did the Supreme Court say in *Meyer v. Holley* (S. Ct. 2003) about agency?** | **In *Meyer v. Holley (S. Ct. 2003)*, the Supreme Court said that traditional agency-law principles apply to federal statutory torts.** |
| **What does it mean to have “assent” for an agency relationship?** | **There must be a clear, mutual agreement that the agent has authority to bind the principal. *General Building Contractors Ass’n v. Pennsylvania* (S. Ct. 1982).** |
| **Does assent have to be express, or can it be implied?** | **Assent may be express or implied.** ***United States v. Ellis* (1st Cir. 2008).** |
| **What kind of control must the principal have over the agent?** | **A principal must have the power to control the agent’s day-to-day operations. *Carlisle v. Deere & Co.* (7th Cir. 2009); *Hofherr v. Dart Indus.* (4th Cir. 1988).** **For the principal to be bound by the agent’s actions, it must have “the right** **to control” those actions. Restatement (Third) of Agency § 1.01 cmt. f.** |
| **Does the requirement of control apply to the TCPA?** | **Yes. Under the TCPA, a principal must have the right to control its agent’s actions.** |
| **What does control look like in a TCPA case?** | **As one district court held, a TCPA plaintiff must show “that the defendant controlled or had the right to control [the caller] and the manner and means of the ... campaign they conducted.” *Keating v. Peterson’s Nelnet* (N.D. Ohio May 12, 2014), *affirmed* (6th Cir. 2015); *see Meyer v. Holley* (S. Ct. 2003) (traditional agency-law principles apply to federal statutory torts).** |
| **Did Krakauer show assent to an agency relationship in this case?** | **No. The companies’ express understanding was that SSN—like the thousands of other companies authorized to market DISH’s services—was an independent contractor. To overcome the parties’ express agreement, Krakauer would have to present “clear, unequivocal, and convincing” proof that they intended to override it. *Stanley’s Cafeteria, Inc. v. Abramson* (Va. 1983).** |
| **Krakauer argues that contract language is not dispositive of the parties’ relationship. AB42–43 (quoting *Robb v. United States* (4th Cir. 1996)).** | **The case Krakauer cites, *Robb v. United States* (4th Cir. 1996), emphasizes that contract language “demonstrates the parties’ belief about the nature of their relationship.” Thus, a prominent agency disclaimer in a formal governing document is highly significant.** |
| **Krakauer cites *Valenti v. Qualex* (7th Cir. 1992) for the principle that “self-serving characterizations” are not relevant to determining agency. AB43. What is your response?** | ***Valenti v. Qualex* (7th Cir. 1992) concerns a conclusory assertion in a summary judgment filing, not contractual language.** |
| **What evidence is there that SSN was an independent contractor?** | **The contract between SSN and DISH is the strongest evidence of their relationship between DISH and SSN. *See Logue v. United States* (S. Ct. 1973) (strongest evidence of relationship is the “contract actually executed between the parties”); Restatement (Third) of Agency § 1.03 (manifestations of intent determine whether an agency relationship was formed).** |
| **Why should the contract control the nature of the relationship between the parties?** | **Such “formal written” instructions are “often dispositive,” Restatement (Third) of Agency § 2.02 cmts. c, f, g, because an “agent has no authority to act contrary to the known wishes and instructions of his principal,” *Old Sec. Life Ins. Co. v. Cont’l Ill. Nat’l Bank and Tr. Co.*, (7th Cir. 1984).** |
| **What did the agreements between DISH and SSN say?** | **The Retailer Agreements between DISH and SSN made clear that SSN was acting, not as an agent, but as an independent contractor.** |
| **Did the contracts between DISH and SSN say anything specifically about agency?** | **Yes. Section 11 of the Retailer Agreements specifically states that SSN is not, and may not claim to be, DISH’s agent:**  **INDEPENDENT CONTRACTOR. The relationship of the parties hereto is that of independent contractors. Retailer shall conduct its business as an independent contractor .... *Retailer ... shall not*, under any circumstances, *hold itself out to the public or represent that it is EchoStar or an ... agent, or sub-agent of EchoStar*....** |
| **Did DISH make sure that SSN understood that it wasn’t an agent?** | **Yes. DISH repeatedly confirmed the parties’ understanding. In 2006, for instance, DISH reminded SSN that:**  **The Retailer Agreement clearly provides that your relationship with EchoStar is that of an independent contractor. Your outbound and inbound call agents MUST identify the company that they work for. AGENTS MAY NOT SAY THAT THEY WORK FOR DISH NETWORK.** |
| **What weight do courts give written contracts in deciding whether there was an agency relationship between parties?** | **The written understanding of contracting parties is powerful evidence of their relationship. *E.g.*, *CFTC v. Gibraltar Monetary Corp.* (11th Cir. 2009); *Children’s Broad. Corp. v. Walt Disney Co.* (8th Cir. 2001) (decisive that parties “expressly disclaimed” agency relationship); *NLRB v. Local Union 1058* (4th Cir. 1992) (written constitution and bylaws show that “individuals clearly did not have the actual authority” to act as agents).** |
| **Was there any evidence presented at trial that the contracts between DISH and SSN created an agency relationship?** | **No. Krakauer presented no evidence at trial that DISH or SSN thought the contracts created an agency relationship. On the contrary, the testimony was consistent with the *express disclaimer of an agency relationship*.** |
| **Would an agency relationship have helped either party?** | **No. DISH and SSN had no reason to create a fiduciary relationship. DISH wanted SSN to market its services, SSN wanted to work with DISH, and neither needed an agency relationship to do that. They just needed to enter into an ordinary contract, like companies do all the time in the marketing context.** |
| **What did the district court rely on to find that SSN was an agent of DISH?** | **(1) Certain provisions in the Retailer Agreements; (2) The parties’ conduct; and (3) The 2009 AVC between DISH and state attorneys general.** |
| **What did the district court rely on to find an agency relationship between DISH and SSN?** | **Notwithstanding the parties’ express agreement, the court thought other contractual provisions implicitly created the agency relationship.** |
| **Why shouldn’t the district court have considered other provisions of the contracts?** | **Interpreting other provisions to nullify the contracts’ express disavowals of agency violates the “cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other.” *Mastrobuono v. Shearson Lehman Hutton* (S. Ct. 1995).** |
| **What is the standard of review for interpreting contracts?** | **This court interprets contracts de novo. *Sky Angel U.S. v. Discovery Commc’ns* (4th Cir. 2018).** |
| **What did the district court rely on in the contracts to find an agency relationship?** | **The court relied on provisions authorizing DISH to enforce performance standards and exercise quality control. Such provisions are routine in independent contractor and franchisee relationships. *E.g., Hoffnagle v. McDonald’s Corp.* (Iowa 1994) (detailing McDonald’s extensive control over franchisees); *see* Restatement (Third) of Agency § 1.01 cmt. f.** |
| **What specific provisions in the contracts did the district court rely on to find an agency relationship?** | **The court pointed to Section 2.3, which requires SSN “to use its best efforts to continuously and actively advertise, promote and market Programming.” The court cited no support for the idea that requiring a party to perform its contractual obligations shows day-to- day control.** |
| **What other provisions** **in the contracts did the district court rely on to find an agency relationship?** | **Paragraph 7.4 states that any “records created or maintained by, or on behalf of, EchoStar relating to any DISH Network Subscriber” belong to DISH. But it stands to reason that DISH would own the records concerning its subscribers, and SSN would control the records regarding its prospects. This doesn’t show assent to an agency relationship, much less operational control.** |
| **What other provisions in the contracts did the district court rely on to find an agency relationship?** | **The court thought the contract gave DISH “nearly unlimited power to impose additional requirements on SSN via ‘business rules.’”** |
| **What does Section 7.3 of the Retailer Agreements require?** | **Section 7.3 requires retailers to follow DISH’s pricing and terms for promotional programming and make accurate disclosures to customers.** |
| **What does Section 7.3 of the Retailer Agreements mean when it requires retailers to follow DISH’s pricing and terms for promotional programming?** | **Section 7.3 means that retailers cannot promise customers promotional packages, prices, or terms that DISH does not offer (e.g., “$1 HBO!”). And if DISH directs the retailer to stop making an offer, or to correct erroneous advertising, the retailer must comply.** |
| **Is the district court’s reading of Section 7.3 of the Retailer Agreements consistent with the rest of the agreements?** | **No. The district court’s interpretation of Section 7.3 as giving DISH control over SSN nullifies Section 11’s express statement about agency. It also disregards the contract’s clear direction that Section 11 applies** **“[n]otwithstanding anything … in this Agreement to the contrary.”** |
| **How do you reconcile Section 7.3 with Section 11 of the Retailer Agreements?** | **Section 7.3 shows at most that DISH “specif[ied] standards” for SSN to follow, *Logue v. United States* (S. Ct. 1973), and “demand[ed] compliance with” them, *Williams v. United States* (4th Cir. 1995).** |
| **Does Section 7.3 of the Retailer Agreements show that DISH had day-to-day control over SSN?** | **No. Section 7.3 is about quality control, which is not sufficient to show the day-to-day control necessary for agency. *Williams v. United States* (4th Cir. 1995); Restatement (Third) of Agency § 1.01 cmt. f; *see also Thomas v. Freeway Foods* (M.D.N.C. 2005) (mere fact that a franchisor was contractually allowed to visit and inspect franchisees did not create agency).** |
| **What else did the district court rely on to find that SSN was an agent of DISH?** | **The court indicated that the parties’ *conduct* established agency.** |
| **Can an agency relationship be implied rather than express?** | **Yes, an agency relationship can be implied. But given DISH and SSN’s express contractual understanding, any implied agency relationship could be established only through “clear and convincing evidence.” *Standard Accident Ins. Co. v. Simpson* (4th Cir. 1933).** |
| **What is required to find an implied agency relationship?** | **The 7th Circuit has explained that, where “language in [a contract] … expressly disavows an agency relationship,” evidence of the parties’ conduct “falls short” unless it provides an especially powerful indication of a contrary intent.** ***Leon v. Caterpillar Indus.* (7th Cir. 1995).** |
| **What evidence was presented about DISH’s control over SSN?** | **The evidence was clear that DISH didn’t want to control the day-to-day activities of SSN; doing so wasn’t practical. Given the sheer number of** **independent retailers around the country—some 3,500 in all—such control was out of the question.** |
| **What evidence was there that SSN was an independent contractor rather than an agent of DISH?** | **SSN made its own hiring decisions, paid its own employees, set hours and terms of employment, and obtained its own office space, telephone lines, and equipment.** |
| **What did the district court say about DISH’s day-to-day control over SSN?** | **The court correctly found that “Dish did not own SSN or direct its day-to-day operations.”** |
| **What did the evidence show about SSN’s daily activities?** | **Uncontroverted testimony established that SSN, not DISH, determined what phone numbers SSN would call and whether SSN would engage in telemarketing at all. DISH did not have the right to control SSN’s sales pitch. SSN’s marketing strategies were proprietary, and SSN didn’t want anyone to have information about their actual sales scripts and how they were selling.** |
| **Did DISH require that SSN market only its products?** | **No, DISH did not require exclusivity. At one time, SSN marketed DISH’s biggest competitor, DirecTV.** |
| **What does *Leon v. Caterpillar Industrial* (7th Cir. 1995) say about agents vs. independent contractors?** | **In *Leon* *v. Caterpillar Industrial* (7th Cir. 1995), the court stated: “[T]hat Calumet could sell Caterpillar’s competitors’ equipment is further evidence that Calumet was not acting principally for Caterpillar’s benefit, but rather as an independent sales representative, to make a profit.”** |
| **What distinguishes an agency agreement from other agreements?** | **What distinguishes an agency agreement from other agreements is “the element of *continuous subjection to the will of the principal*.” Restatement (Second) of Agency § 1 cmt. B (emphasis added).** |
| **What else did the district court rely on to find that SSN was an agent of DISH?** | **DISH required SSN to comply with telemarketing laws and scrub its call lists with PossibleNow (a company specializing in TCPA compliance) to ensure they contained no numbers on the Registry.** |
| **Do performance requirements create an agency relationship?** | **No. Just like imposing quality-control standards, requiring compliance with government laws and regulations does not create an agency relationship. DISH isn’t controlling SSN – the law is. *See FedEx Home Delivery v. NLRB* (D.C. Cir. 2009).** |
| **What else did the district court rely on to find that SSN was an agent of DISH?** | **The court pointed to a 2009 Assurance of Voluntary Compliance (AVC) between DISH and state attorneys general, in which DISH agreed to monitor and discipline retailers for telemarketing violations. The court found this to be evidence of DISH’s ability to control SSN’s day-to-day marketing operations.** |
| **Does the AVC say anything about retailers like SSN?** | **The AVC expressly recognizes that retailers like SSN are “independent.”** |
| **Does the AVC establish DISH’s control over SSN?** | **No. A third-party covenant to look for contractor violations does not establish the control that is necessary for an agency relationship. Including this commonplace requirement did not convert an independent contractor into an agent.** |
| **If we conclude that SSN was acting as DISH’s agent, was SSN acting within the scope of its authority?** | **No. Even if SSN had been given actual authority, SSN exceeded its scope when it violated DISH’s express instructions, including not to call Krakauer.** |
| **When is a principal liable for the acts of its agent?** | **A principal is liable only for acts within the scope of the agent’s authority. *Meyer v. Holley* (S. Ct. 2003); *United States v. Hilton* (4th Cir. 2012); Restatement (Third) of Agency § 2.02.** |
| **Can unlawful acts ever be within the scope of an agent’s authority?** | **Unlawful acts are almost never within the scope of an agent’s authority, except where the principal issues clear instructions to break the law. Restatement (Third) of Agency § 2.02 cmt. h.** |
| **Did DISH limit SSN’s authority in any way?** | **Yes. DISH expressly limited SSN’s authority by instructing it not to call numbers on the Do Not Call Registry. And it instructed SSN not to call Krakauer himself. SSN acted outside the scope of any authority by disregarding those instructions.** |
| **Why did the district court conclude that SSN acted within the scope of its authority as an agent of DISH?** | **The district court concluded that SSN acted within the scope of its authority because it said that DISH consented or acquiesced to the conduct.** |
| **Did DISH consent or acquiesce to SSN’s conduct?** | **No. DISH repeatedly instructed SSN to follow the law. The Retailer Agreement states:**  **Retailer shall comply with all applicable governmental statutes, laws, rules, regulations, ordinances, codes,** **directives, and orders …, and Retailer is solely responsible for its compliance ….** |
| **Is it common for contracts to instruct independent contractors to follow the law?** | **Yes. Such contractual provisions are common and essential; it is not possible to scrutinize every action taken by a nationwide network of independent contractors.** |
| **Were DISH’s retailers told anything specifically about telemarketing laws?** | **Yes. DISH repeatedly stressed that it does “not tolerate or condone marketing activities that fail to comply with … applicable state and federal laws.” More specifically, DISH required retailers to comply with all applicable state and federal “Do Not Call” laws, including the TCPA.** |
| **Did DISH tell SSN anything about Krakauer specifically?** | **Yes. DISH told SSN not to call Krakauer.** **After Krakauer complained to DISH, DISH instructed SSN to “immediately insure that this phone number has been added to your internal [Do Not Call] Registry.”** |
| **How did SSN respond to DISH’s instruction to not call Krakauer?** | **SSN told DISH that it had addressed the issue, removed Krakauer’s phone number from its list of numbers to be called, and added Krakauer’s phone number to its internal Do Not Call list.** |
| **If SSN exceeded the scope of its authority, how would that affect the jury verdict?** | **It would be critical because, as the court instructed the jury, if Krakauer “fails to establish any essential part of his claim by a preponderance of the evidence, then you should find against him and the class ….”** |
| **When does an agent exceed his authority?** | **In *Standard Accident Ins. Co. v. Simpson* (4th Cir. 1933), the 4th Circuit stated that an agent exceeded his authority when the principal “expressly forbade” the conduct. The Restatement also explains: “[A]n agent’s actual authority extends only to acts that the agent reasonably believes the principal has authorized or wishes the agent to perform.” Restatement (Third) of Agency § 2.02 cmt. g.** |
| **What evidence is there that SSN exceeded its authority?** | **(1) SSN disregarded DISH’s instructions to not call Krakauer; and (2) It disregarded DISH’s other, repeated instructions to comply with the law, including telemarketing laws.** |
| **What does it mean when an agent goes against the principal’s instructions?** | **When an agent “expressly contradict[s]” the principal’s “actual instructions, this is clearly not express … agency.” *Bridgeview Health******Care Ctr. v. Clark* (7th Cir. 2016), *cert. denied* (S. Ct. 2016).** |
| **What happened in *Bridgeview Health Care Ctr. v. Clark* (7th Cir. 2016)?** | ***Bridgeview Health Care Ctr. v. Clark* (7th Cir. 2016) is closely analogous to this case. In *Bridgeview*, the defendant contracted with a marketer to send about 100 faxes to local businesses within a 20-mile radius. Instead, the marketer sent nearly 5,000 faxes across three states in violation of the TCPA. The 7th Circuit held that the defendant could not be held liable for faxes sent outside the scope of its authorization.** |
| **What did the court say in *Jones v. Royal Admin. Servs.* (9th Cir. 2018)?** | **In *Jones v. Royal Admin. Servs.* (9th Cir. 2018), the 9th Circuit said that a contract between a company and its marketer prohibiting telemarketing methods that would violate state or federal law precludes liability.** |
| **Why did the district court conclude that DISH could be liable actions taken outside of SSN’s authority?** | **The court said that DISH failed to adequately monitor SSN’s telemarketing compliance and, therefore, implicitly overruled its express instruction that SSN did have to comply with the law.** |
| **What authority did the court rely on in concluding that DISH’s failure to supervise created authority for SSN to act?** | **Neither Krakauer nor the court cited any authority holding that a principal’s mere failure to supervise creates actual authority for an agent to act.** |
| **Was there any evidence that DISH’s instructions not to violate the TCPA were not serious?** | **No. There was no evidence that DISH’s repeated instructions not to violate the TCPA were “empty words” that SSN interpreted as meaning the opposite, or that SSN thought it could ignore.** |
| **Was there any evidence that DISH wanted SSN to act unlawfully?** | **No. There was no evidence that DISH wanted SSN to act in the unlawful fashion it did.** |
| **Doesn’t Section 227(c)(5)’s use of “on behalf of” mean that Congress intended to impose vicarious liability on principals like DISH whose agents commit TCPA violations?** | **The text of Section 227(c)(5) states: “A person who has received more than one telephone call within any 12-month period *by or on behalf of the same entity* in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State.” (emphasis added).** |
| **What has the FCC said about the “on behalf of” language in Section 227(c)? AB48.** | **From Krakauer’s brief: The FCC has recognized that section 227(c)’s “on behalf of” language may “provide a broader standard of vicarious liability for do-not-call violations,” and might even go “beyond agency principles.” *In re Joint Pet. Filed by Dish Network* (FCC 2013). And Commissioner Pai expressed his view that “the statutory phrase ‘on behalf of’ explicitly extends third-party liability” to “do-not-call violations whenever a telemarketer initiates a call on a seller’s behalf, even if that telemarketer is not under the seller’s control.” *Id.* AB48.** |
| **What did the court in *Huggins v. FedEx Ground Package Sys.* (8th Cir. 2010) say about agency?** | **In *Huggins v. FedEx Ground Package Sys.* (8th Cir. 2010), the Eighth Circuit stated that provisions purporting to designate one party as independent “will not trump provisions that actually reserve the [principal’s] right to control” the agent’s actions.** |
| **What does theRestatement say about independent contractors vs. agents?** | **The Restatement (Third) of Agency § 1.02 (2006) states that provisions designating a party as independent are not determinative. Rather, the facts of the relationship matter.** |
| **Was the question of whether SSN was DISH’s agent a jury question?** | **No. Numerous cases, including from this Circuit, hold that agency is a legal question, warranting de novo review, where the historical facts are undisputed, as they are here.** |
| **Is agency a question of fact or a question of law?** | **Where, as here, the historical facts are not in dispute, the question of agency is a legal question. This appeal is about what *types* of facts demonstrate agency, not whether the jury was wrong about any particular historical fact. *United States v. Clarke* (S. Ct. 2014). *But see* Krakauer’s Brief: “[T]he existence and scope of agency relationships are factual matters” committed to the jury. *Metco Prods., Inc. v. NLRB* (4th Cir. 1989). AB26.** |
| **DISH represented to 46 state Attorneys General that “it had the authority to and would monitor compliance of all its marketers, including SSN, with telemarketing laws.” Doesn’t this show control over its retailers?** | **The agreement does not show the parties assented to an agency relationship, nor a right for DISH to exercise day-to-day operational control. DISH merely agreed to require the contractors to comply with the law, which is another kind of quality control.** |
| **Did SSN sell anything besides DISH during the class period?** | **No, but that was SSN’sdecision. At other points, SSN sold DIRECTV, and there was no exclusivity requirement between SSN and DISH. This therefore weighs *against* agency. *Leon v. Caterpillar Indus.* (7th Cir. 1995).** |
| **Did SSN have direct access to DISH’s computer system?** | **Krakauer is referring to a website that retailers use to send DISH customer orders. It’s the same tool that RadioShack and Sears used to enter DISH orders without becoming DISH’s agents. Creating a platform for retailers to conveniently send orders does not create agency.** |
| **Did DISH allow SSN to use its name and logo?** | **Using a company’s name and logo is common for independent retailers and franchisees (e.g., McDonald’s), which is why it does not create agency. *E.g., Leon v. Caterpillar Indus.* (7th Cir. 1995).** |
| **If SSN was acting as DISH’s agent, is the question of whether it was acting within the scope of its authority for the court or the jury to decide?** | **This is a question of law. There are two legal rules that Krakauer does not dispute: (1) Crimes and torts are not within the scope of an agent’s authority unless the principal issued clear instructions to break the law; and (2) Where the principal expressly prohibits conduct without later expressly contradicting that proscription, there is no authority and therefore no liability for that conduct.** |
| **Did DISH ratify SSN’s past violations of the TCPA?** | **No. A principal can be responsible for an agent’s past violation if the principal *ratifies* it. But that requires a “manifestation of assent to be bound by the prior act.” Restatement (Third) of Agency § 4.01 cmt. b. The district court rejected that ratification theory on summary judgment for lack of any such manifestation, and Krakauer does not challenge that ruling.** |
| **What evidence is there that DISH did not acquiesce in SSN’s past violations of the TCPA?** | **After Krakauer complained to DISH about SSN’s call, DISH forbade SSN from calling him again. Krakauer does not identify any evidence that DISH even suggested—much less clearly communicated—that it actually *did* want SSN to call Krakauer again.** |
| **Is there any evidence that DISH instructed SSN to violate the law?** | **No. There is nothing in record that reflects a clear instruction from DISH to violate the law. And Krakauer doesn’t cite any case holding that overriding DISH’s explicit instruction not to violate the law could be inferred from silence.** |
| **Krakauer cites *Montgomery Ward v. Medline* (4th Cir. 1939 and *Metco Prods., Inc. v. NLRB (4th Cir. 1989)* for the proposition that the scope of an agent’s authority is a factual matter for the jury to decide.** | **This Court has held that “where there is doubt as to the servant’s scope of authority the trial judge is required to resolve the doubt in favor of the plaintiff and submit the evidence to the jury, upon the ground that the employer had placed the servant in position to do the wrongful act.” *Montgomery Ward v. Medline* (4th Cir. 1939); *accord Metco Prods., Inc. v. NLRB (4th Cir. 1989)* (explaining that this is a “factual matter[]”). AB46.** |
| **Plaintiffs argue that, because DISH knew of SSN’s prior TCPA violations, it acquiesced in its later violations. AB47. How do you respond?** | **For a principal to be responsible for an agent’s past violation, the principal must *ratify* it, which requires a “manifestation of assent to be bound by the prior act.” Restatement (Third) of Agency § 4.01 cmt. b. On summary judgment, the district didn’t find any such manifestation, and Krakauer does not challenge that ruling. AB47.** |
| **What is the standard of review for the jury verdict and findings?** | **This Court doesn’t weigh evidence or assess credibility. *United States v. Saunders* (4th Cir. 1989). It “cannot reverse a jury verdict except ‘when there is a complete absence of probative facts to support the conclusion reached.’” *Sherrill White Const, Inc., v. S.C. Nat’l Bank*, 713 F.2d 1047, 1050 (4th Cir. 1983); *see Vodrey v. Golden*, 864 F.2d 28, 30 n.4 (4th Cir. 1988). AB26.** |
| **Argument IV: The treble-damages award must be overturned** | **Color:** |
| **Why did the district court award treble damages?** | **The district court thought DISH should have done more to monitor SSN, including by hiring an outside auditor.** |
| **When does the TCPA authorize treble damages?** | **The TCPA authorizes treble damages when “the defendant willfully or knowingly” disregarded the statute. 47 U.S.C. § 227(c)(5)(C). Treble damages aren’t available for negligence.** |
| **Why do you say that treble damages aren’t available for negligence?** | **For treble damages, the plaintiff must show willfulness or knowledge.** |
| **What does a plaintiff need to show for willfulness or knowledge?** | **The plaintiff must show the defendant knew it “was performing the conduct that violates the statute,” *Lary v. Trinity Physician Fin. & Ins. Servs.* (11th Cir. 2015) (TCPA case). Or, the plaintiff must show the defendant assumed “a risk of violating the law substantially greater than the risk associated with … mere[] careless[ness],” *Safeco Ins. Co. v. Burr* (S. Ct. 2007) (articulating willfulness standard).** |
| **Did the district court find that DISH knew SSN was violating the TCPA?** | **No. The court imputed SSN’s willfulness and knowledge to DISH, and determined that DISH “should have known” about SSN’s conduct. This amounts to finding that DISH was negligent in failing to investigate and monitor SSN more closely.** |
| **What did the district court find regarding SSN’s conduct?** | **The district court concluded that SSN willfully and knowingly violated the provisions of the TCPA, and that SSN’s conduct could be imputed to DISH.** |
| **Why did the district court impute SSN’s conduct to DISH?** | **The court applied what it called the “traditional rule” that a principal is liable for the willful acts of his agent.** |
| **Why was the district court’s application of the “traditional rule” incorrect?** | **If a principal did not direct, approve, or participate in its agent’s conduct, the principal may be required to pay compensatory damages, but is not liable for “vindictive damages.” *The Amiable Nancy* (S. Ct. 1818); *accord Kolstad v. Am. Dental Ass’n* (S. Ct. 1999).** |
| **When is a principal liable for enhanced damages?** | **A principal is liable for enhanced damages based on its agent’s conduct only when the principal engages in “reckless disregard of federally protected rights.” *Kolstad v. Am. Dental Ass’n* (S. Ct. 1999). The principal’s *own conduct* must reflect this heightened responsibility.** |
| **The district court relied on *Bosh v. Cherokee County Building Authority* (Okla. 2013). What does that case say?** | **In *Bosh v. Cherokee County Building Authority* (Okla. 2013), the Oklahoma Supreme Court stated that “a principal … is generally held liable for the willful acts of an agent” under Oklahoma law. The court simply acknowledged that an agent’s willfulness doesn’t necessarily foreclose the principal’s liability. But this case does not establish a rule concerning vicarious liability for enhanced damages.** |
| **The district court also relied on the Restatement (Third) of Agency § 7.04. What does the Restatement say about imputing an agent’s knowledge to the principal?** | **The Restatement states that a principal is generally liable for conduct by an agent within the scope of its authority. Restatement (Third) of Agency § 7.04. It does not establish a rule concerning vicarious liability for enhanced damages.** |
| **Did the district court find that DISH acted willfully?** | **Yes. The court held in the alternative that DISH itself acted willfully. But it applied a legally incorrect standard.** |
| **What is the standard for willfulness?** | **To “willfully” violate federal law, one must act “recklessly”: with an “unjustifiably high risk of” violating the statute. *Safeco Ins. Co. v. Burr* (S. Ct. 2007). Willfulness is not to be found in a typical case, but only in rare cases involving “egregious … behavior.” *Halo Elecs. v. Pulse Elecs.* (S. Ct. 2016).** |
| **What is required to find willfulness?** | **Willfulness requires more than mere carelessness or negligence. *Safeco Ins. Co. v. Burr* (S. Ct. 2007). It requires a “substantially greater” showing than negligence. *Id.*** |
| **What is the standard for recklessness?** | **“[A] reckless defendant is one who … knows of a substantial and unjustified risk of such wrongdoing” and acts nonetheless. *Global-Tech Appliances v. SEB* (S. Ct. 2011); *RSM v. Herbert* (4th Cir. 2006).** |
| **What is the standard for knowing conduct?** | **“Knowing” conduct requires actual knowledge of the circumstances giving rise to liability. *RSM v. Herbert* (4th Cir. 2006). “[T]he violator [must] know he was performing the conduct that violates the statute.” *Lary v. Trinity Physician Fin. & Ins. Servs.* (11th Cir. 2015).** |
| **Did the district court make any findings about whether DISH’s conduct was knowing?** | **No. Although the court stated that DISH acted “willfully and knowingly,” it did not analyze the question of knowing conduct or make the requisite findings.** |
| **Did the district court apply a willfulness standard to DISH when it trebled the damages?** | **No. The district court applied a substantially lower standard than willfulness. In assessing willfulness, the court asked whether DISH “ha[d] reason to know, or should have known, that [SSN’s] conduct would violate the statute.” JA\_\_[Doc.338at21]. But “know or should have known” is the standard for negligence, not willfulness. *BMG Rights Mgmt. v. Cox Commc’ns* (4th Cir. 2018).** |
| **Why do you argue that the district court applied a negligence standard to DISH?** | **Over and over, the court criticized DISH for failing to adequately monitor and investigate SSN. And the court purported to balance the cost of monitoring with the likelihood of discovering violations. But the reasonableness of preventative actions “bear[s] primarily on the question of negligence.”** ***Mosser v. Fruehauf Corp.* (4th Cir. 1991).** |
| **Why isn’t negligence the proper standard for awarding enhanced damages?** | **There could be no negligence (leave aside willfulness) unless the TCPA imposed a duty of care on DISH, and the court identified no such duty.** |
| **You argue that the district court should not have relied on the AVC. Why not?** | **The AVC was a 2009 voluntary agreement between DISH and 46 state attorneys general. It is a private agreement that confers no “rights or remedies” “upon any person”** **and “may not be enforced by any person, entity, or sovereign except the Attorneys General.” JA\_\_[PX55§7.2]. The AVC could not create a TCPA duty, or a new willfulness standard, applicable only to DISH.** |
| **What should happen to the damages award?** | **Damages must be reduced to the $400-per-call awarded by the jury. Or, at a minimum, the case must be remanded for application of the proper legal standard.** |
| **If there was no willful or knowing conduct by DISH, what should happen to the damages award?** | **Alternatively, the enhanced damages should be reversed outright because DISH’s conduct was not willful or knowing as a matter of law*. See Humphrey v. Humphrey* (4th Cir. 2006) (“court need not remand a case if the record permits only one resolution”).** |
| **You argue that DISH had an objectively reasonable basis to believe it was complying with the TCPA. Why is that?** | **At the time of the calls, no court had imposed TCPA liability based on the conduct of an agent. Also, it was reasonable to believe that SSN was not DISH’s agent.** |
| **Why do you say that DISH reasonably believed it had satisfied its legal obligations under the TCPA?** | **It was reasonable for DISH to believe that it couldn’t be held liable for calls made by SSN.** **Before the end of the class period, no court had held that an entity (like DISH) that neither placed violative calls nor directed an agent to call specific people could be held liable.** |
| **What does the TCPA say about vicarious liability?** | **During the class period, the TCPA supplied no clear answer. That is why the Sixth Circuit referred the question to the FCC in *Charvat v. EchoStar Satellite* (6th Cir. 2010).** |
| **What did the FTC say about vicarious liability?** | **In 2013, two years after the class period, the FCC held in a declaratory ruling that a seller like DISH could be liable under the TCPA for calls it did not place.** |
| **What was the FCC’s reasoning in its 2013 declaratory ruling holding that sellers could be liable for the conduct of telemarketers?** | **Although the TCPA’s plain text indicates that “a seller” is not directly liable for a violation of the TCPA unless it initiates a call itself, the FCC construed the TCPA to incorporate federal common law agency principles for TCPA violations committed by third-party telemarketers.** **28 FCC Rcd. 6574 (2013).** |
| **What does *Safeco Ins. Co. v. Burr* (S. Ct. 2007) say about knowing or willful conduct?** | **In *Safeco Ins. Co. v. Burr (S. Ct. 2007)*, the Supreme Court said that conduct is not willful or knowing if it is based on an “erroneous, [but] not objectively unreasonable” understanding of the law.** **Thus, the Court held that an analogous willfulness requirement was not satisfied where the defendant’s errant belief in the lawfulness of its conduct was “not reckless.”** |
| **How does *Safeco Ins. Co. v. Burr* (S. Ct. 2007) help you here?** | **Under *Safeco Ins. Co. v. Burr (S. Ct. 2007)*, DISH cannot be a “knowing or reckless violator” because the statutory text and relevant court and agency guidance allowed for more than one reasonable interpretation.** |
| **Under the FCC’s 2013 declaratory ruling, was it reasonable for DISH to believe that SSN wasn’t its agent?** | **Yes, it was reasonable for DISH to conclude that SSN was not its agent: (1) The contracts between DISH and SSN explicitly stated there was no agency relationship; (2) No witness or document suggested that DISH or SSN understood themselves to be in a principal-agent relationship; and (3) It was reasonable for DISH to believe that SSN would not act outside the scope of any authority by disregarding DISH’s express directions not to call people on the Registry.** |
| **Had any other courts considered DISH’s relationship with its retailers before the class period?** | **Yes. In 2009, a district court rejected agency arguments about a different DISH retailer. *Charvat v. EchoStar Satellite* (S.D. Ohio 2009). [The 6th Circuit then referred the matter to the FTC to allow the agency to interpret certain provisions of the TCPA and its accompanying regulations. In 2013, the FCC issued a declaratory ruling interpreting the TCPA. The 6th Circuit vacated the district court’s judgment and remanded the case for consideration of plaintiff’s claims in light of the FCC's ruling.]** |
| **What if we decided that DISH was not reasonable in its belief that SSN was not acting as its agent?** | **Even if DISH was not reasonable it its belief that SSN was not its agent, it was not “obvious” to DISH that SSN presented a “substantial” and “unjustifiable” risk of placing tens of thousands of unlawful Registry calls during the class period, especially given DISH’s explicit instructions. *Safeco Ins. Co. v. Burr* (S. Ct. 2007).** |
| **Was DISH willful in ignoring the risk that SSN was violating the TCPA?** | **There is no evidence DISH knew SSN was engaged in widespread TCPA violations during the class period (May 2010 to August 2011). DISH didn’t receive a single complaint from an SSN call recipient during the class period, indicating that SSN presented little risk of TCPA violations, let alone a “high risk” of widespread violations. *Safeco Ins. Co. v. Burr* (S. Ct. 2007).** |
| **What would DISH expect if one of its retailers was engaging in widespread violations of the TCPA?** | **DISH’s head of third-party compliance gave uncontroverted testimony that violations correlate with complaints: One would expect a “staggering number” of complaints if a retailer took no precautions to avoid calling people on the Do Not Call Registry, yet DISH received none during the class period.** |
| **How did Krakauer prove willfulness in this case?** | **Krakauer pointed to a handful of complaints about SSN that DISH received *before* the class period. The district court concluded that DISH’s decision to continue contracting with SSN after these complaints, and not take any action to monitor or oversee SSN, showed willful participation by DISH in SSN’s violations *during* the class period.** |
| **Does DISH’s knowledge of earlier complaints about SSN establish willfulness during the class period?** | **No. The mere fact that DISH knew of a few earlier complaints doesn’t establish DISH acted willfully during the relevant time.** |
| **What did *Levy v. Receivables Performance Mgmt.* (E.D.N.Y. 2013) say about prior violations and willfulness?** | **Prior violations, without more, don’t demonstrate willfulness *even when the defendant itself engaged in the prior conduct*. *Levy v. Receivables Performance Mgmt.* (E.D.N.Y. 2013) (“[T]he fact that [the defendant] has been found to have violated the TCPA in other instances does not suggest, as a matter of law, that they acted knowingly and willfully.”)** |
| **Were those prior complaints about SSN relevant at all?** | **Prior complaints about SSN would only be relevant to determine if DISH was reckless in concluding (during the class period) that SSN posed no risk of widespread TCPA violations. But the evidence shows that it was reasonable (and at worst, negligent) for DISH to believe SSN posed no such risk.** |
| **Why was it reasonable for DISH to believe that SSN posed no risk of widespread TCPA violations?** | **After complaints about SSN placing pre-recorded calls in 2004 (years before the class period) and lawsuits against SSN in that period under state Do Not Call statutes, DISH repeatedly warned SSN to comply with the law—*and the pre-recorded call violations stopped*. Also, SSN changed its management in 2006. And in 2008, SSN contracted with PossibleNow—the industry leader in telemarketing- compliance services—to scrub its call lists.** |
| **Did DISH receive any complaints about SSN after it changed its management in 2006?** | **From the time of the 2006 management change through the end of the class period in 2011, DISH received only 5 Registry-related complaints from SSN call recipients. Measured against a background of** **millions of calls, this raised no red flag for SSN.** |
| **Was it reasonable for DISH to rely on complaints as the barometer for TCPA compliance?** | **The district court thought it was unreasonable for DISH to rely on complaints as the barometer of TCPA compliance. But “reasonableness” wasn’t the standard; that denotes negligence. And DISH’s conclusion was not reckless: Even a few inadvertent errors may not amount to “willful” failures. *RSM v. Herbert* (4th Cir. 2006). That is especially true for the TCPA; perfect TCPA compliance is nearly impossible.** |
| **Should the complaints about SSN have alerted DISH that SSN was not scrubbing its customer lists against the Registry during the class period?** | **The district court believed these facts established willfulness because, in its view, a telemarketer who uses unscrubbed lists knows it will call people on the Registry. But when DISH investigated, SSN explained that Krakauer and Campbell had been SSN customers, and so fell within a TCPA exception for established business relationships. This didn’t indicate a widespread problem with scrubbing, because there is no obligation to scrub established business relationships against the Registry.** |
| **What did DISH do after receiving the complaints about SSN?** | **After SSN explained that Krakauer and Campbell had been SSN customers and fell within a TCPA exception for established business relationships, DISH told SSN to seek legal counsel to confirm its understanding of the established business relationship exception. SSN promised it would never call either person again. And DISH received no further complaints from people with whom SSN said it had established business relationships.** |
| **You argue that it violates due process to use the TCPA to punish DISH’s supposed non-compliance with the AVC. Please explain.** | **“Due process does not permit courts, in the calculation of punitive damages, to adjudicate the** **merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis ….” *State Farm Mut. Auto. Ins. v. Campbell* (S. Ct. 2003).** |
| **For what purpose was the AVC admitted into evidence?** | **The court admitted the AVC into evidence, over DISH’s Rule 403 objection, for one limited purpose: assessing agency. The court therefore erred when it used the document to assess willfulness. *United States v. Poole* (4th Cir. 2011) (court erred when it “apparently gave some consideration to matters that were not in evidence in the case”).** |
| **Did DISH present any evidence of its compliance with the AVC?** | **No. Had DISH known that compliance with the agreement would be used to assess willfulness, it would have responded with evidence establishing its compliance.** |
| **Has DISH complied with the AVC?** | **Yes. As the federal court in Illinois found, DISH made real changes in late 2008 and 2009. It fired numerous Retailers, cut the number of Order Entry Retailers, and instituted changes in the Quality Assurance** **program.** |
| **Didn’t DISH’s corporate counsel warn the company’s top executives that that “SSN is a problem because we know what he is doing and have cautioned him to stop.” AB1, 10, 53.** | **Four points: (1) Cautioning SSN to stop is the opposite of directing it to continue; (2) the email is from September 2005—5 years before the class period; (3) the calls that prompted the email weren’t from SSN; and (4) the email addressed robocalling that SSN ceased that year.** |
| **Didn’t Congress want to encourage private enforcement under Section 227(c)(5) for people who receive repeated unsolicited telemarketing calls?** | **[Explain.]** |
| **How do telemarketers like SSN get paid?** | **They get paid through commissions on sales volume. AB8.** |
| **Plaintiffs argue that DISH’s contract with SSN gave DISH virtually unlimited power to monitor and control SSN and its telemarketing calls. AB9. What control did DISH have over SSN?** | **[Explain.]** |
| **Plaintiffs argue that DISH had control over SSN’s marketing. Did it?** | **No. The district court found that “Dish did not own SSN or direct its day-to-day operations.” Rather than *operational control*, DISH tried to maintain *quality control* over its retailers.** |
| **What kind of quality control measures did DISH impose on SSN?** | **The Retailer Agreements grant DISH the power to decide what programming packages to sell, and at what price—and requires SSN to properly disclose information to customers. This is classic quality control that cannot create agency.** |
| **Plaintiffs argue that DISH wrote, approved, and monitored SSN scripts. Is this accurate?** | **[Explain.]** |
| **Do quality control measures create an agency relationship?** | **No. Agency law recognizes that a business must be free to impose standards for acceptable service quality without running the risk of transforming an independent contractor into an agent. Restatement (Third) of Agency § 1.01 cmt. f(1); *Cislaw v. Southland Corp.* (Cal. App. 1992).** |
| **What would be the kind of operational control that would create an agency relationship?** | ***Huggins v. FedEx Ground Package Sys.* (8th Cir. 2010), cited at AB43, shows the operational control missing here. In *Huggins*, a company that delivered packages for FedEx was FedEx’s agent where its company drivers looked and acted like FedEx employees, could be given drug and alcohols tests and disqualified by FedEx, were required to submit daily fuel receipts and daily shipping documents to FedEx, and were required to use vehicles that identified them as part of the FedEx system.** |
| **How is this case different from *Huggins v. FedEx Ground Package Sys.* (8th Cir. 2010), where a company delivering packages for FedEx was found to be FedEx’s agent?** | **Unlike the delivery company in *Huggins v. FedEx* (8th Cir. 2010), where the company’s drivers looked and acted like FedEx employees, DISH prohibited SSN from holding itself out as DISH. DISH also required that callers “MUST identify the company that they work for.”** |
| **Didn’t the parties’ contract give DISH control over SSN’s marketing and power to impose requirements about telemarketing on SSN?** | **That misreads the contract. The contract merely grants DISH the power to decide what programming packages to sell, and at what price—and requires SSN to properly disclose information to customers. This is classic quality control that cannot create agency. Krakauer failed to address either legal point in his brief.** |
| **Didn’t DISH’s compliance manager know about two injunctions against SSN for TCPA violations, specifically for illegally calling people on the do-not-call registry?** | **[Explain.]** |
| **What did DISH’s compliance manager do after learning of a class-action lawsuit against SSN for TCPA violations?** | **[Explain.]** |
| **At some point, were DISH’s commission payments to SSN being garnished because of SSN’s repeated violations of the do-not-call regulations? AB11.** | **[Explain.]** |
| **Did DISH reward SSN with incentive trips after it learned of Krakauer’s complaint in 2009?** | **No. The incentive trip that Krakauer refers to occurred years before the calls to Krakauer and Campbell.** |
| **Plaintiffs state that, after signing the AVC with the state AGs, DISH’s co-founder testified that nothing changed – DISH operated the same way before and after the AVC. Is that correct?** | **No. The court mischaracterized DISH’s co-founder as having said that the AVC “did not change DISH’s procedures at all.” The testimony was that DISH disciplined retailers both before and after the AVC. Plus, as the federal court in Illinois found, DISH made real changes in late 2008 and 2009. It fired numerous Retailers, cut the number of Order Entry Retailers, and instituted changes in the Quality Assurance** **program.** |
| **What steps did DISH take after entering the AVC in 2009 to monitor and enforce SSN’s compliance with telemarketing laws?** | **[Explain.]** |
| **The district court called DISH’s TCPA compliance policy “two-faced.” Is that a fair characterization?** | **[Explain.]** |
| **Why do you argue that the treble-damages award must be overturned?** | **The treble damages must be vacated if not reversed outright. The district court applied the wrong legal standard, and the evidence is legally insufficient to punish DISH for SSN’s conduct.** |
| **What is the standard for imposing treble damages?** | **For treble damages, the TCPA requires that “the defendant willfully or knowingly violated the” TCPA. 47 U.S.C. § 227(c)(5)(C).** |
| **Krakauer cites *Louis Pizitz Dry Goods v. Yeldell* (S. Ct. 1927) for the proposition that a principal can face punitive damages for his agent’s willful acts. Is that correct?** | ***Yeldell* (S. Ct. 1927) merely held that states *may* hold principals vicariously liable for punitive remedies without violating due process. It confirms the federal rule that “[g]uilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages.”** |
| **How does Section 227(c)(5)’s imposition of liability for calls made “by or on behalf of the same entity” affect whether damages may be trebled?** | **Section 227(c)(5) governs direct liability. The treble-damages provision is different—like the common law, it requires “*the defendant* willfully or knowingly violated the” TCPA. 47 U.S.C. § 227(c)(5)(C) (emphasis added). The FCC decision that Krakauer cites also concerns direct liability, not treble damages.  *In re Joint Pet. Filed by Dish Network* (FCC 2013).** |
| **Are you challenging the finding that SSN willfully and knowingly violated the TCPA?** | **[Explain.]** |
| **What was the basis of the district court’s finding that DISH acted willfully?** | **The district court found that DISH acted willfully based on (1) the “traditional rule” that a principal is liable for the willful acts of his agent committed within the scope of the agent’s actual authority; and (2) its conclusion that DISH “knew or should have known that its agent, SSN, was violating the TCPA.”** |
| **What did the Supreme Court say about a principal’s liability for the acts of his agent in *Louis Pizitz Dry Goods v. Yeldell* (S. Ct. 1927)?** | **From Krakauer’s brief: In *Louis Pizitz Dry Goods v. Yeldell* (S. Ct. 1927), the Supreme Court upheld a punitive-damages award against a principal for an agent’s *negligent* acts. AB47.** |
| **Does *Kolstad v. Am. Dental Ass’n* (S. Ct. 1999) say that principals may avoid punitive-damages liability for their agents’ willful acts only if they engage in “good faith efforts” to ensure compliance? AB48–49.** | **No. There is no such “good faith efforts” rule. *Kolstad* states that willfulness requires that the defendant *itself* engaged in “reckless disregard of federally protected rights.” And *The Amiable Nancy* (S. Ct. 1818) doesn’t mention good faith at all.** |
| **You argue that the district court erred by finding that DISH “had reason to know, or should have known” that SSN’s conduct would violate the TCPA. How was that error?** | **The district court’s “should have known” standard is the classic negligence formulation. That, alone, requires a remand. *Raleigh Wake Citizens Association v. Wake County Board of Elections* (4th Cir. 2016).** |
| **Does the failure to monitor and investigate SSN make DISH liable for SSN’s bad conduct?** | **No. The TCPA creates no such duty. Congress made “establishing and implementing … reasonable practices and procedures to effectively prevent” TCPA violations an *affirmative defense* to TCPA liability, but never suggested that failing to do so *creates* TCPA liability, much less for enhanceddamages. 47 U.S.C. § 227(c)(5)(C).** |
| **What is required to find willfulness where a principal fails to act?** | **Even in the cases Krakauer cites, willfulness required a failure to act in the face of a clear duty to do so. AB4, 50 (citing *United States v. Blankenshi*p (4th Cir. 2017); *Redman v. RadioShack Corp.* (7th Cir. 2014)).** |
| **Did the district court find that DISH knowingly violated the TCPA?** | **No. The district court’s order addressed only the *willfulness* of DISH’s conduct. Moreover, Krakauer points only to statements that DISH knew about possible *past* transgressions by SSN. But a knowing violation requires knowledge of the conduct that violates the statute. *Lary v. Trinity Physician Financial & Ins. Servs.* (11th Cir. 2015).** |
| **Why was it reasonable for DISH to believe it was complying with the TCPA?** | ***First*, it was reasonable to conclude that SSN was not DISH’s agent. And *second*, at the time of the calls, no court had imposed vicarious liability on a seller like DISH. DISH’s objectively reasonable beliefs foreclosed punitive damages.** |
| **Why was it reasonable for DISH to conclude that SSN was not DISH’s agent?** | **It was reasonable to conclude that SSN was not DISH’s agent given (1) the plain language of the Retailer Agreement; (2) before the class period, a district court held that DISH’s Retailer Agreement created no agency relationship; and (3) SSN disregarded DISH’s clear instructions when it called Registry numbers, including Krakauer’s.** |
| **Doesn’t “willful” conduct mean conduct that involves “an unjustifiably high risk of harm that is either known or so obvious that it should be known.” *Safeco Ins. Co. of Am. v. Burr* (S. Ct. 2007).** | **[Explain.]** |
| **Why do you argue that DISH doesn’t owe a duty of care under the TCPA? OB64. Doesn’t the TCPA impose such a duty?** | **[Explain.]** |
| **Didn’t the district court find that DISH’s conduct was *knowing*?** | **The district court found that (1) DISH had received many complaints and *knew* of at least three lawsuits; (2) *knew* SSN’s explanations were not credible; and (3) *knew* SSN was not scrubbing all its lists or keeping call records. AB51.** |
| **Didn’t the district court, at a minimum, find that DISH was reckless, *i.e.*, entailing an unjustifiably high risk of harm?** | **The district court stated: “This case does not involve an inadvertent or occasional violation. It involves a sustained and ingrained practice of violating the law.” “Under these circumstances, what Dish calls a mistaken belief is actually willful ignorance.” AB50.** |
| **Did DISH recklessly disregard a risk that SSN was committing widespread TCPA violations?** | **No. DISH did not recklessly disregard any widespread risk. DISH received only five complaints between SSN’s management change in 2006 and the class period. And Krakauer didn’t respond to unrefuted testimony that one complaint a year—out of millions of calls—is evidence of TCPA *compliance*.** |
| **What evidence establishes that DISH recklessly disregarded the substantial likelihood of widespread violations?** | **Krakauer cites a 2005 DISH email—“SSN is a problem because we know what he is doing. ... Eventually, someone will try to use that against us.” That email was sent *five years* before the class period, did not concern SSN calls, and addressed robocalling that SSN stopped that year. Krakauer also cites an email stating that DISH would send “our standard go after SSN letter” in response to complaints about SSN. But sending those letters shows diligence. Nothing about these two examples demonstrates a substantial risk of widespread violations, and they do not come close to justifying an additional $40 million in liability.** |
| **You argue that DISH shouldn’t be held liable just because no court or agency had held, at the time of SSN’s calls, that a seller could be liable under the TCPA for calls it did not place. But doesn’t the text of the TCPA control rather than a lack of authority at the time of the violation?** | **[Explain.]** |
| **Did DISH have a “standard go after SSN letter.” Doesn’t that show that it knew of complaints about SSN’s illegal telemarketing practices?** | **[Explain.]** |
| **Did the district court abuse its discretion in trebling the damages award?** | **[Explain.]** |