

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

FRANCIS WOODROW, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

FISERV, INC.,

Defendant,

Case No.: 2:18-cv-1054

CLASS ACTION

DEMAND FOR JURY TRIAL

CLASS ACTION COMPLAINT

Plaintiff Francis Woodrow (“Plaintiff”), individually and on behalf of all others similarly situated, alleges on personal knowledge, investigation of counsel, and on information and belief as follows:

NATURE OF ACTION

1. This case involves Fiserv, Inc. (“Fiserv” or “Defendant”), acting on behalf of various financial institutions and other entities, making automated calls and/or using pre-recorded messages to individuals who have no connection with Fiserv or the entities employing Fiserv, in plain violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (hereinafter referred to as the “TCPA”).

2. As described more fully below, Fiserv has violated the TCPA by making calls to Plaintiff and Class Members on their cellular telephones using an “automatic telephone dialing system” and/or an “artificial or prerecorded voice” as described in 47 U.S.C. § 227(b)(1), without Plaintiff’s and Class Members’ prior express consent within the meaning of the TCPA.

3. Plaintiff brings this action for statutory damages and injunctive relief under the TCPA.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction pursuant to the Class Action Fairness Act of 2005 (“hereinafter referred to as CAFA”), codified as 28 U.S.C. § 1332(d)(2). The matter in controversy exceeds \$5,000,000, in the aggregate, exclusive of interest and costs, as each member of the proposed Class of thousands is entitled to up to \$1,500.00 in statutory damages for each violation of the TCPA. Further, Plaintiff alleges a national class, which will result in at least one Class member from a different state.

5. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 and 47 U.S.C. § 227 *et seq.*

6. This Court has personal jurisdiction over Fiserv because, on information and belief, the conduct at issue in the case occurred in the State of Wisconsin, the company is licensed to conduct business in the State of Wisconsin, and the company is headquartered in the State of Wisconsin. As such, Fiserv has purposefully availed itself of the resources and protection of the State of Wisconsin.

7. Venue is proper in the United States District Court for the Eastern District of Wisconsin because Fiserv is deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced, and because Fiserv’s contacts with this District are sufficient to subject it to personal jurisdiction, since it is headquartered in this District.

PARTIES

8. Plaintiff Francis Woodrow is, and at all times mentioned herein was, an individual citizen of the State of Tennessee, who resides in Murfreesboro, Tennessee.

9. Defendant Fiserv, Inc. is a Wisconsin corporation with its principle place of business in Brookfield, Wisconsin, within this District.

THE TELEPHONE CONSUMER PROTECTION ACT OF 1991 (TCPA), 47 U.S.C. § 227

10. In 1991, Congress enacted the TCPA¹ in response to a growing number of consumer complaints regarding certain telemarketing practices.

11. The TCPA regulates, among other things, the use of automatic telephone dialing equipment, or “autodialers.”

12. Specifically, the plain language of section 227(b)(1)(A)(iii) of the TCPA prohibits the use of autodialers to make any call to a wireless number in the absence of an emergency or the prior express consent of the called party.

13. According to findings by the FCC, the agency Congress vested with authority to issue regulations implementing the TCPA, such calls are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live calls, and such calls can be costly and inconvenient.

14. The FCC also recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used.²

¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227 (TCPA). The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*

15. On January 4, 2008, the FCC released a Declaratory Ruling wherein it confirmed that autodialed and prerecorded message calls to a wireless number are permitted only if the calls are made with the “prior express consent” of the called party.³

FACTUAL ALLEGATIONS

16. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153(39).

17. In August and September of 2017, Plaintiff received approximately 15 phone calls on his cellular telephone from telephone number 800-394-3755 (the “3755 Number”).

18. On information and belief, Fiserv controls, utilizes and/or operates the 3755 Number to place prerecorded and/or automated calls to consumers in connection with its operations.

19. Of the calls, Plaintiff Woodrow received from the 3755 Number, he answered several of them. Each of the calls Plaintiff Woodrow answered involved a pre-recorded message. The message stated, in essence, “We have important information to speak to you about. Please call us between regular business hours...”

20. On information and belief, based on this volume of the calls within a relatively short time, combined with the fact that each of the calls which Plaintiff answered immediately triggered a pre-recorded message, the calls made to Plaintiff were made using an automated telephone dialing system (“ATDS”).

² *In re Rules and Regulations Implementing the TCPA*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115 (¶ 165) (2003).

³ *In re Rules and Regulations Implementing the TCPA*, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559, 564-65 (¶ 10) (2008) (“2008 FCC Declaratory Ruling”).

21. On September 18, 2017, for the sole purpose of getting the prerecorded calls to stop, Plaintiff called the 3755 Number. During this call, a live agent informed Plaintiff that the calls were being made on behalf of Nationwide Bank, N.A. The agent did not state why Fiserv was attempting to contact Plaintiff on behalf of Nationwide Bank, but she said she would remove his number from their system.

22. On information and belief, the agent that Plaintiff spoke to on September 18, 2017 was an employee of Fiserv.

23. On information and belief, Fiserv made the calls to Plaintiff in the belief it was reaching a Nationwide Bank customer.

24. However, even after Plaintiff demand that the calls stop, Fiserv called Plaintiff multiple additional times, including on September 20, 2017 and yet again on September 22, 2017.

25. Plaintiff does not, and has never had, any relationship with either Nationwide Bank or Fiserv. And no point did Plaintiff provide his telephone number to either Fiserv or Nationwide Bank.

26. Fiserv is, and at all times mentioned herein was, a “person,” as defined by 47 U.S.C. § 153(39).

27. With regard to Plaintiff, Fiserv used a system that delivered pre-recorded messages from its own office, or hired a company that engages in the use of such a system on Fiserv’s behalf.

28. Fiserv is directly liable for the calls to Plaintiff, and those similarly situated class members because it actively participated in every aspect of the autodialed and/or pre-recorded calls.

CLASS ACTION ALLEGATIONS

29. Plaintiff incorporates by reference all other paragraphs of this Complaint as if fully stated herein.

30. Plaintiff brings this action individually and on behalf of all other persons similarly situated pursuant to Federal Rule of Civil Procedure 23, as set forth below.

31. Plaintiff proposes the following Class definition, subject to amendment as appropriate:

All persons in the United States who received a prerecorded and/or automated call from Fiserv, where Fiserv was attempting to contact someone other than the Class Member.

Collectively, all these persons will be referred to as “Class Members.”

32. Plaintiff is a member of, and will represent the interests of, the Class.

33. Excluded from the Class is Defendant, and any entities in which Defendant has a controlling interest, Defendant’s agents and employees, any Judge to whom this action is assigned, and any member of such Judge’s staff and immediate family, and claims for personal injury, wrongful death and/or emotional distress.

34. Plaintiff does not know the exact number of Class Members in either Class, but Plaintiff reasonably believes Class Members in each class number, at minimum, in the thousands.

35. Plaintiff and all Class Members have been harmed by the acts of the Defendant, including, but not limited to, the invasion of their privacy, annoyance, waste of time, the deletion of their cell phone battery, and the intrusion on their cellular telephone that occupied it from receiving legitimate communications.

36. This Class Action Complaint seeks injunctive relief and money damages.

37. The joinder of all Class Members is impracticable due to the size and relatively modest value of each individual claim.

38. Additionally, the disposition of the claims in a class action will provide substantial benefit to the parties and the Court in avoiding a multiplicity of identical suits.

39. Class Members can be identified through records maintained by Fiserv, its agents, and/or telephone carriers.

40. There are well-defined, nearly identical questions of law and fact affecting all parties.

41. The questions of law and fact, referred to above, involving the class claims predominate over questions which may affect individual Class Members.

42. Such common questions of law and fact include, but are not limited to, the following:

a. Whether Defendant used an automatic telephone dialing system in its non-emergency calls to Class Members' telephones.

b. Whether Defendant used an artificial or prerecorded voice in its non-emergency calls to Class Members' telephones.

c. Whether the Defendant can meet its burden of showing it obtained prior express consent (*i.e.*, written consent that is clearly and unmistakably stated), to make calls to the Class;

d. Whether the Defendant's conduct was knowing and/or willful;

e. Whether the Defendant is liable for statutory damages; and

f. Whether the Defendant should be enjoined from engaging in such conduct in the future.

43. Further, Plaintiff will fairly and adequately represent and protect the interests of the Class.

44. Plaintiff has no interests which are antagonistic to any member of the Class.

45. Plaintiff has retained counsel experienced in handling class action claims involving violations of federal consumer protection statutes, including claims under the TCPA.

46. A class action is the superior method for the fair and efficient adjudication of this controversy.

CAUSES OF ACTION

FIRST COUNT

STATUTORY VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. § 227 ET SEQ.

47. Plaintiff incorporates by reference the foregoing paragraphs of this Complaint as if fully set forth herein.

48. The foregoing acts and omissions of the Defendant constitute numerous and multiple violations of the TCPA, including but not limited to each of the above cited provisions of 47 U.S.C. § 227 *et seq.*

49. As a result of the Defendant's violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and Class members are entitled to an award of \$500 in statutory damages for each and every violation of the statute, pursuant to 47 U.S.C. § 227(b)(3)(B).

50. Plaintiff and Class Members are also entitled to and do seek injunctive relief prohibiting the Defendant's violation of the TCPA in the future.

SECOND COUNT

KNOWING AND/OR WILLFUL VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. § 227 ET SEQ.

51. Plaintiff incorporates by reference all other paragraphs of this Complaint as if fully stated herein.

52. The foregoing acts and omissions of the Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each of the above-cited provisions of 47 U.S.C. § 227 *et seq.*

53. As a result of the Defendant's knowing and/or willful violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and each Class Member is entitled to treble damages of up to \$1,500 for each and every violation of the statute, pursuant to 47 U.S.C. § 227(b)(3).

54. Plaintiff and all Class Members are also entitled to and do seek injunctive relief prohibiting such conduct violating the TCPA by the Defendant in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court grant Plaintiff and all Class Members the following relief against the Defendant:

A. Injunctive relief prohibiting such violations of the TCPA by the Defendant in the future;

B. As a result of the Defendant's willful and/or knowing violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class Member treble damages, as provided by statute, of up to \$1,500 for each and every violation of the TCPA;

C. As a result of Defendant's statutory violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class Member \$500 in statutory damages for each and every violation of the TCPA;

E. An award of attorneys' fees and costs to counsel for Plaintiff and the Class as permitted by law;

F. An order certifying this action to be a class action pursuant to Federal Rule of Civil Procedure 23, establishing an appropriate Class the Court deems appropriate, finding that Plaintiff is a proper representative of the Class, and appointing the lawyers and law firms representing Plaintiff as counsel for the Class;

G. Such other relief as the Court deems just and proper.

Dated: July 10, 2018

By: /s/ Michael J. Boyle, Jr.
Michael J. Boyle, Jr.

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Attorneys for Plaintiff and the Proposed Class

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all counts so triable.

Dated: July 10, 2018

By: /s/ Michael J. Boyle, Jr.
Michael J. Boyle, Jr.

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

FRANCIS WOODROW, individually and on behalf of a class of similarly situated people

(b) County of Residence of First Listed Plaintiff Rutherford (TN)
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Michael J. Boyle, Jr., MEYER WILSON CO, LPA, 1320 Dublin Road, Suite 100, Columbus, OH, 43215, (614) 224-6000

DEFENDANTS

FISERV, INC.

County of Residence of First Listed Defendant Waukesha
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation - Transfer
- 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

47 U.S.C. s.227 et seq.

Brief description of cause:

Illegal automated telephone calls to non-customers in violation of the Telephone Consumer Protection Act

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$ 9,999,999.00

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE 7/10/18

SIGNATURE OF ATTORNEY OF RECORD

Michael J. Boyle Jr.

FOR OFFICE USE ONLY

UNITED STATES DISTRICT COURT

for the

Eastern District of Wisconsin

FRANCIS WOODROW, individually and on behalf of
all others similarly situated

Plaintiff(s)

v.

FISERV, INC.

Defendant(s)

Civil Action No. 2:18-cv-1054

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) FISERV, INC. c/o
Corporation Service Company
8040 Excelsior Drive
Madison, WI 53717

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Michael J. Boyle, Jr.
MEYER WILSON CO., LPA
1320 Dublin Road, Suite 100
Columbus, OH 43215
(614) 224-6000
mboyle@meyerwilson.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk