

Ninth Circuit Affirms Summary Judgment for Defendant Taco Bell in Putative TCPA Text Message Class Action

September 16, 2014

The recipient of a text message advertising Taco Bell products sued the company, alleging that the message violated the Telephone Consumer Protection Act's (TCPA) prohibition on calls to cell phones using an auto-dialer or artificial or prerecorded voice, without the recipient's prior express consent. However, the message was not sent by Taco Bell, but by a text-messaging service retained by an advertising agency hired by the Chicago Area Taco Bell Local Owners Advertising Association. The Association is comprised of Chicago area store owners and Taco Bell. In affirming the district court's decision in favor of Taco Bell, the Ninth Circuit Court of Appeals, in *Thomas v. Taco Bell Corp.*, cited a recent FCC ruling, noting that the TCPA contemplates vicarious liability. **Specifically, to establish vicarious liability, plaintiff had to establish that the Association, advertising agency and text-messaging service acted as agents of Taco Bell, i.e., that Taco Bell controlled or had the right to control the manner and means of the text message campaign.** The court agreed that Taco Bell did not control the actions of these entities with respect to the text-messaging campaign. It added that the FCC ruling also contemplates vicarious liability through theories of apparent authority and ratification but concluded that an apparent authority theory failed because the plaintiff could not establish that she reasonably relied to her detriment on any apparent authority between Taco Bell and these entities. The court similarly discarded the ratification theory because it, too, requires a principal-agent relationship which it had already concluded did not exist.

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