

Marketing Consultant May Be Held Liable Under TCPA for Its Third-Party Marketer's Unsolicited Text Messages

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Last Friday, the U.S. Court of Appeals for the Ninth Circuit held that a marketing consultant for the United States Navy – the Campbell-Ewald Company – could be held liable for a third-party marketer's violations of the Telephone Consumer Protection Act ("TCPA") arising out of the transmittal of unsolicited text messages.

The Navy hired Campbell-Ewald to develop and execute a multimedia recruiting campaign and the parties agreed that, as part of the marketing campaign, Campbell-Ewald would send text messages to cellular users that had consented to receive the recruitment solicitation. Campbell-Ewald outsourced the text message dialing to a company called Mindmatics which was responsible both for generating the list of phone numbers to be dialed and for physically transmitting the text messages. In the suit, the plaintiff claimed that he did not consent to receipt of the message and alleged that Campbell-Ewald violated the TCPA. The plaintiff did not name the Navy or Mindmatics as a defendant.

Although it conceded that the FCC recognizes vicarious liability under the TCPA, Campbell-Ewald argued that vicarious liability only extends to the merchant whose goods or services are being promoted by the telemarketing campaign. The Ninth Circuit rejected that argument, explaining that the FCC has never stated that vicarious liability is only applicable to these entities and,

[a]s a matter of policy it seems more important to subject the consultant to the consequences of the TCPA infraction. After all, a merchant presumably hires a consultant in part due to its expertise in marketing norms. It makes little sense to hold the merchant vicariously liable for a campaign he entrusts to an advertising professional, unless that professional is equally accountable for any resulting TCPA violation.

While not a watershed decision in its own right, *Gomez* does represent one of two federal appellate court decisions holding that, in fact, a party may be held vicariously liability for the TCPA violations of another. (*Thomas v. Taco Bell Corp.*, -- Fed. Appx. --, 2014 WL 2959160 (9th Cir. July 2, 2014) is the other.) Further, the decision reconfirms that marketers and their third-party marketers need to be very careful when outsourcing telemarketing work to others, as the reverberations from TCPA violations may be felt up the chain.