Published on *The National Law Review* https://natlawreview.com

Threat to an Entire Industry? Major Lead Providers Unable to Enforce Website Terms— Stuck in TCPA Class Action After Plaintiff Denies Providing Lead on Website

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Boy is this timely.

Just this Tuesday the TCPAWorld.com team was on the big stage at Lead Generation World warning lead aggregators of a massive threat to their industry—a new TCPA theory focusing on so-called "bogus" leads. Indeed, we reported last week that a class action lawyer from California put his own skin in the game by serving as a class representative in a new suit against a major lead aggregator.

Well nearly simultaneous with our on-stage discussion, a court in the Eastern District of California was handing down a whale of a ruling—denying arbitration to Digital Marketing Solutions and LowerMyBills.com (two giants in the lead aggregation space) and forcing these companies to move forward with a TCPA class action pending against them. And that is very bad news—not just for these two companies but for the entire lead aggregation industry and those who rely on leads purchased from third-parties.

First a quick primer. A "lead aggregator" or "lead seller" is a company that obtains traffic or data for a "lead buyer"—usually a seller looking to connect with interested customers. While leads can be obtained and qualified by aggregators in a number of ways, a common way is through the use of website form fields. The website will generally advertise a specific product (or 'vertical") such as insurance quotes, and will prompt an interested party to share their personal information to obtain a quote or other data of their choosing.

And while it may seem counterintuitive, there is big money in finding people to sell to people who want to sell things to people. Big money. Lead aggregation—or "performance marketing"—is a multi-billion dollar industry that turns, in large measure, on the ability to prove that folks signed up for services through the internet; a forum that allows for stubborn anonymity.

So what happens when a company captures data on their website pertaining to a specific person—think name, address, phone number, ip address—yet that person denies ever encountering the website? Can that person, nonetheless, be presumed to have accepted disclosures on that website or otherwise provided their contact information? Well, according to the court in Hansen v. Rock Holdings, No. 2:19-cv-00179-KJM-DMC, 2020 U.S. Dist. LEXIS 9924 (E.D. Cal. Jan. 21, 2020)

the answer is as simple as “no.”

In Hansen the Defendants had collected the Plaintiff’s phone number from a website offering to lower bills. This “lead” resulted in phone calls, which Defendants contend were perfectly lawful. But, more pertinently, Defendants contend that in supplying his information he accepted a binding arbitration provision contained within the website’s T&C’s. Interestingly, the “lead” provided the name of Plaintiff’s mother—not Plaintiff—although it included the Plaintiff’s phone number. This transaction was captured by a third-party lead verifier—yes there are companies that specialize in tracking website interactions to confirm the acceptance of specific disclosures by specific ip addresses and sell these services to lead aggregators to make their leads more attractive to lead purchaser—so there could be little dispute that somebody interacted with the website and supplied more-or-less accurate information. Defendants argued, therefore, that either Plaintiff entered his mother’s name and his own phone number into the site, thereby indicating he agreed to LMB’s Terms of Use containing the arbitration clause. Or plaintiff’s mother—who happens to be newly deceased—entered her name and Plaintiff’s phone number on the website, thereby binding Plaintiff to the arbitration clause.

In opposition to the motion Defendant denied encountering the website but—in a fascinating twist—also introduced three sworn affidavits from individuals who purportedly entered information on the LMB website but did not hit “submit” but who still received calls from marketers acting on the leads supplied by LMB. In other words—according to the court—a jury could find that anyone could have entered Plaintiff’s information on the website and not hit “submit” and yet still have received the challenged phone calls. Hence a jury must determine whether or not Plaintiff—directly or indirectly—actually assented to accept the arbitration clause.

Next, although the court sustained Defendant’s objections to Plaintiff’s proffer of evidence regarding what his mother did or did not due—and struck hearsay statements she purportedly made prior to her death on hearsay grounds—the court yet found that his mother’s acceptance of LMB’s arbitration provision would not bind him. His mother accepted those terms—he did not. And no doctrine of California law would permit the Court to hold him to his mother’s agreement.

Motion to compel denied.

So there you have it. A seemingly lock solid record of consent and acceptance of online disclosures evaporated in the face of a self-serving affidavit by the Plaintiff denying visiting the website. Notably the issue is now headed for a jury trial—the parties are ordered to swiftly submit a report to the court setting the timing for the remainder of the case.

But do rulings such as those in *Hansen* suggest a dark fate for an entire industry? It seems that an industry built upon the enforceability of webform submissions cannot long survive in a world where such data is subject to such constant scrutiny without a way to definitively link a person to the lead. Like a castle built upon sand, and all that…

This seems like a problem bound to get worse before it doesn’t get better. And while the sky isn’t falling just yet, the time for the industry to lawyer/expert up and fight this like the existential threat it has become is certainly upon us.

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