

Court Holds No Vicarious Liability Under TCPA for Text Message Sent by Wireless Carrier Promising Free Sandwich

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The TCPA not only carries draconian penalties, but courts as of late seem to have been rather lenient in allowing claims to proceed based on very thin theories of vicarious liability. However, an opinion by the Seventh Circuit will hopefully help reign in this troubling trend.

In *Warcia v. Subway Restaurants, Incorporated*, No. 19-1577, 2020 WL 559105 (7th Cir. Feb. 5, 2020), a consumer brought an action against Subway Restaurants for violating the TCPA. The consumer received a text message sent by his wireless carrier, T-Mobile, that promised a free sandwich from the restaurant just for being a T-Mobile customer. The carrier was not part of the lawsuit due to an arbitration provision, but Plaintiff attempted to sue Subway based upon a theory that Subway was vicariously liable for T-Mobile's text.

In deciding whether to uphold the District Court's dismissal of the action, the court examined whether the consumer's complaint included enough facts to show that the restaurant chain owner had either express or apparent authority over the wireless carrier. The Court of Appeals upheld the District Court's decision, finding that the defendant could not be held vicariously liable under the TCPA.

Drawing upon traditional rules of agency, the court stated that "to be held vicariously liable under the TCPA, an agent must have express or apparent authority." The Court of Appeals rejected the consumer's argument that by merely engaging into a contractual relationship with the wireless carrier, which was the only conduct by the restaurant alleged in the complaint, the restaurant entered into an agency relationship with the carrier. **The court reasoned that while an agency relationship can be created via contract, simply entering into a contract does not, by itself, create an agency relationship.**

The Plaintiff alternatively theorized Subway was vicariously liable under a theory of apparent authority because "T-Mobile's statement led recipients to believe the text came from Subway." However, the court rejected this argument as well finding that "statements by an agent are insufficient to create apparent authority without also tracing the statement to a principal's manifestations or control."

Importantly, the court found "numerous indications" that T-Mobile, not Subway, had control over the timing, content, or recipients of the text message. In fact, the text message was part of a promotional

service by the wireless carrier which offered free items and discounts via text message every Tuesday to its customers. The text message stated that the promotion was part of this service, that the free sandwich was “just for being w/ T-Mobile,” was sent on Tuesday only to the wireless carrier’s customers, and included a link to the wireless carrier’s website.

The court’s opinion in *Warciak* is a positive development that helps put better-defined parameters around vicarious liability of TCPA violations. Too often, those parameters have seemed amorphous or shifting. **But the Seventh Circuit’s opinion is clear that a normal contractual relationship—absent any indication of control over the messages at issue—is not enough to establish vicarious liability.**

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