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

Off Target: Major Retailer Dismissed from TCPA Suit Initiated By Questionable Revocation Effort

Article By:

Eric J. Troutman

One of my least favorite "scams" in TCPAWorld—and it is a scam *in my opinion*— is when a consumer's lawyer sends a vaguely worded or incomplete letter requesting calls to stop to some corporate headquarters somewhere, knowing full well the letter is unreasonably crafted and/or directed, and then sues when calls continue. This tactic is even less savory when there is a third-party involved who is actually making the calls.

Consider the recent TCPA adventure involving TD Bank and Target.

In *Miler v. Td Bank United States,* 3:20-cv-00340-BR, 2020 U.S. Dist. LEXIS 184658 (D. Or. Oct. 6, 2020) the Plaintiff opened a credit card with TD, bought some stuff at Target and then didn't pay for it. Somebody—the opinion does not specify who precisely—started calling Plaintiff to collect on the debt and Plaintiff contends both Target and TD are to blame.

Plaintiff's theory was that Defendants violated the TCPA because his counsel sent letters to TD requesting calls to stop but they kept coming. According to TD's well-adorned answer (I like this trend folks), however, the letters:

> "*were sent to TD's headquarters, not to the credit-card servicer to whom they should have been directed and who was clearly and conspicuously identified on the monthly account statements that were sent to Mr. Miler. The letters also did not identify which retailer's card Mr. Miler had an account for, but rather gave only a partial account number TD issues cards for multiple retailers, each of whose cards is independently serviced. While a credit-card servicer might be able to identify an account from the information in Mr. Miler's letter, TD's headquarters could not, and could not identify which servicer it could direct the letter*."

While TD answered with these alleged facts, Target moved to dismiss the case altogether. Target argued that Plaintiff never alleged sending a revocation letter *to it* and there was no reason to assume—and indeed TD expressly denies—that the letter was ever forwarded to it.

Target's argument could have fallen on deaf ears—after all, many courts have observed that consent is a defense the absence of which does not need to be affirmatively pleaded—but since Plaintiff's case was ostensibly a revocation case (and Plaintiffs *do* have the burden of proving revocation) the Court took up the issue in earnest at the pleadings stage.

Crediting the allegations in TD's answer, the Court found there was no basis to conclude that Target ever knew about the revocation request. Further Target was alleged to be an agent of TD for some reason—dubious in my opinion— but not vice versa. So while knowledge in Target's possession would flow "up" to TD under the imputed knowledge doctrine, knowledge in TD's possession does not flow "down" to Target. Accordingly Target was not alleged to have, could not be imputed to have, and per the allegations of TD's answer did not actually have, knowledge of the revocation effort.

Case dismissed.

Interesting little case as you can see. Notably the Court probably wouldn't have gone so far so quickly if the revocation letter hadn't been so dicey to begin with. This was a nice job by Target's lawyers to tee up this issue early and extract themselves from the case and a nice assist by TD in supplying needed additional color to the Court in the answer. Nice hand and glove tactics here. Good work all.

National Law Review, Volume X, Number 281