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

Wrong Party Consent is No Defense: Court Refuses to Dismiss TCPA Suit Arising Out of Consent of Third Party

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A very common type of TCPA suit is one that arises from a consumer entering a wrong phone number on a webform.

This is a real problem for callers who have no real way of detecting whether the number is valid or not–although some vendors do exist that help with this sort of thing. When they attempt to make outreach to the consumer they believed provided the consent they can end up calling the wrong person–which, in turn, can lead to a massive class action. Just ask this guy:

Well in *Balack v. RentBeforeOwning.com,* 2022 WL 7320045 (C.D. Cal. Oct. 11, 2022) the Defendant decided to move to dismiss a TCPA class action alleging that it had texted the wrong number.

The Defendant's argument was something you might see in 2014. Because it had the consent of *somebody* –the intended recipient of the text–it doesn't matter that the text reached the wrong person.

Unfortunately the "intended recipient" approach to the "called party" consent definition has gone the way of the Yangtze River dolphin, and is no longer viable.

Accordingly the Court made short work of the Defendant's motion:

Defendant argues that the text messages submitted by Plaintiff as part of the FAC demonstrate that Defendant had been given "express written consent" to contact the cellphone number at issue. The FAC includes screenshots of several text messages received by Plaintiff. The message in the first screenshot reads "Thank You for Signing up for Property Alerts." Dkt. 17-1 at 2. The message in the second reads "Good morning, Harry. Search for properties in 74063 now." Id. Several of the messages also include the language "Reply HELP for HELP – STOP to stop." Id. at 6-7, 9-12.

Defendant does not dispute either that Plaintiffs name is not Harry, or that she does not reside within the area of zip code 74063. However, Defendant argues that these messages reflect that they were directed to a person who had signed up for Defendant's services. Defendant also argues that Plaintiff continued to receive messages, but did not elect to opt out, notwithstanding that some of the messages provided that opportunity. Defendant argues that, for these reasons, the messages

demonstrate that Defendant had obtained consent to send them to the cellphone at issue.

Defendant's argument is unpersuasive. To demonstrate "prior express invitation or permission," the FCC regulations require evidence of a "signed, written agreement." 47 C.F.R. § 64.1200(c)(ii)*. The screenshots do not constitute such a signed agreement between Plaintiff and Defendant. Nor do they demonstrate that there was a "voluntary two-way communication" between Plaintiff and Defendant that would constitute an "established business relationship."* 47 C.F.R. § 64.1200(f)(5)*. Plaintiff alleges that she "did not consent to receive those text messages or any communication from Defendant." FAC ¶ 20. The identification of a recipient by a different name in the text messages does not contradict this allegation. Thus, this allegation is sufficient to state the claim that Plaintiff did not provide prior permission for the communications.*

For what its worth, the court also determined allegations of "residential usage" of a cell phone are sufficient to state a claim. As I reported yesterday, the Ninth Circuit just imposed a presumption of residentialness with respect to cell numbers on the DNC (just awful) so, yeah, have fun with that TCPAWorld.

National Law Review, Volume XII, Number 287