

## **CRUMBLING: LeadGen Continues to Unravel as Court Refuses to Enforce The Leads Warehouse Lead in TCPA Class Action**

Article By:

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Another day, another story about a court refusing to enforce a third-party lead.

In *Hall v. Schwartz*, 2024 WL 4335509 (S.D. Oh. Sept. 27, 2024) the defendant had purchased a third-party Medicare lead from the Leads Warehouse for Medicare. The Defendant had used a pre-recorded greeting to initiate the contact and then a live agent was to join the call.

The Defendant moved for summary judgment arguing both that the pre-recorded greeting did not constitute a “call” and that the consent Plaintiff provided on the the website “[www.securemedicareenrollment.com](http://www.securemedicareenrollment.com)” permitting the calls regardless.

The Court sided with Plaintiff.

First the court had little trouble determining the use of a prerecorded greeting to initiate the call constituted the use of a prerecorded voice for TCPA purposes. This is an unsurprising result as the FCC previously held soundboard calls were prerecorded calls and other courts had similarly held that greetings—such as “this call may be recorded for quality purposes” were sufficient to trigger the prerecorded call component of the TCPA.

More interesting was the review of the consent provision.

The website had a decent consent provision reading: *“By clicking the ‘Submit’ button below you are providing your express written consent by electronic signature to be contacted by Secure Medicare Enrollment and our Marketing Partners via: automated telephone dialing systems, artificial or prerecorded voices, by email, SMS text message or live agent to the phone number provided, even if my telephone number is a mobile number that is currently listed on any state, federal or corporate ‘Do Not Call’ list, regarding telemarketing promotions for products or services....”*

And the court did not quibble with it.

Instead the issue here was whether Plaintiff signed the form at all. The website operator submitted an affidavit suggesting Plaintiff’s name and demographic information was submitted on the form. The

Plaintiff, however, denied visiting the website. That was sufficient for the court to deny judgment to defendant and send the issue to the jury:

*In contrast, plaintiff denies that he consented to defendant's telephone sales calls to his cell phone. He avers, "Plaintiff did not request to be contacted by entering his information into the website nor did [p]laintiff authorize another individual or entity to enter his information. If [p]laintiff's information was entered into a website as a means of requesting contact about Medicare, then [p]laintiff is the victim of identity fraud...." (Doc. 43-2 at PAGEID 228, Ex. 3, Request for Admission 2 Response). 5 Viewing the evidence in the light most favorable to plaintiff, the court finds there is a genuine factual dispute as to whether plaintiff gave his consent to be contacted by defendant.*

So Plaintiff submits a declaration saying he never visited the website and now a jury needs to figure it out.

In fairness, I think the court reached the right decision here. This *is* a question of fact and a jury *does* need to figure it out.

Its just one more reminder of why callers relying on third-party leads have so much risk on their shoulders:

1. The lead form must be valid (and it often isn't)
2. The lead buyer must be on the form (ask Quote Wizard)
3. The lead buyer actually has to be able to prove the interaction on the website took place;
4. The consumer must have actually filled out the form.

While issues 1-3 might be solvable with a Jornaya or TrustedForm and good practices, issue no. 4 is a risk inherent in every single lead that is purchased. And, as this case shows, the issue often needs to be sorted out by a jury.

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