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

Ninth Circuit Addresses TCPA Text Message Claims - Telephone Consumer Protection Act

Article By:

Matthew J. Adler

In *Gomez v. Campbell-Ewald Co.*, No. 13-55486, 2014 WL 4654478 (9th Cir. Sept. 19, 2014), a panel of the Ninth Circuit Court of Appeals addressed several recurring issues in TCPA litigation, including: the efficacy of Rule 68 offers to moot putative class actions; potential First Amendment defenses; and vicarious liability.

Plaintiff Gomez sued Campbell-Ewald Company, a marketing consultant for the Navy, over **an unsolicited marketing text message** that Gomez received in 2006. Presumably because of the Navy's sovereign immunity, the **plaintiff elected to sue only Campbell-Ewald** on a single claim for violation of Section 227(b)(1)(A)(iii) of the TCPA. Campbell-Ewald responded with a Rule 68 offer of $1503 per violation, plus reasonable costs. After the plaintiff declined that offer, but before he moved for class certification, Campbell-Ewald moved for summary judgment, invoking the doctrine of derivative sovereign immunity, among other issues. Finding that the doctrine provided Campbell-Ewald a complete defense, the district court granted the motion, and did not reach the other issues.

The Ninth Circuit reversed, ultimately disagreeing with the district court's analysis of derivative sovereign immunity. The panel also considered and rejected arguments raised by Campbell-Ewald on three other key issues.

Rule 68 Offers Do Not Moot Individual Or Class Claims. The panel rejected Campbell-Ewald's argument that its Rule 68 offer mooted the plaintiff's claim and deprived the Court of Article III jurisdiction.

Campbell-Ewald acknowledged that Ninth Circuit precedent required that result. *See Diaz v. First Am. Home Buyers Prot. Corp.,* 732 F.3d 948 (9th Cir. 2013) (plaintiff's individual claim not mooted by plaintiff's rejection of Rule 68 offer); *Pitts v. Terrible Herbst, Inc*., 653 F.3d 1081 (9th Cir. 2011) (putative class claims not mooted by plaintiff's rejection of Rule 68 offer before motion for class certification).

But it argued that *Pitts* and *Diaz* were no longer good law after*Genesis Healthcare Corp v. Symczyk*, 133 S.Ct. 1523 (2013).

The panel rejected this argument on the ground that *Genesis* applied only to collective actions under

the FLSA, not class actions under Rule 23. Notably, the panel did not cite or otherwise address *Chen v. Allstate Ins. Co.*, No.13-16816 (9th Cir.), in which the Ninth Circuit has accepted interlocutory review of this same issue.

First Amendment No Bar To Section 227(b)(1) Text Claims. Here, the panel found the outcome was largely dictated by *Moser v. FCC*, 46 F.3d 970 (9thCir. 1995), which the panel described as "affirm[ing] the constitutionality of this section of the TCPA." *Gomez*, 2014 WL 4654478, at *3.

But *Moser* considered whether Congress, in enacting the TCPA in 1991, had sufficient basis to regulate "telemarketing calls to homes" through Section 227(b)(1)'s restrictions. *Moser*, 46 F.3d at 972. As the first text message was sent in 1992, Congress did not consider text messages in enacting Section 227(b)(1), nor did the *Moser* panel consider same in affirming its constitutionality. And 14 years after*Moser*, when the Ninth Circuit held that a text message was a call within the meaning of Section 227(b)(1)(A), *see Satterfield v. Simon & Schuster, Inc.,* 569 F.3d 946 (2009), the court did not consider or address the First Amendment implications of that holding.

That left the *Gomez* panel to decide whether Congress, in enacting Section 227(b)(1) to regulate telemarketing to residences, had established an appropriate time, place and manner restriction on text message marketing. Unfortunately, in concluding in the affirmative, the panel simply fast-forwarded to 2014, and in particular to a July 2014 L.A. Times blog post. That blog post in turn cited CDC statistics, also released in July 2014, indicating that currently over 40% of households have "cut the cord," and rely exclusively on wireless telephones for residential use.

But the claims of the plaintiff and putative class members involved a text message campaign conducted in 2006, not 2014. The FCC's Report on Competition from 2006 cited NHIS survey results indicating that 7.8 percent of households relied exclusively on mobile phones.*See In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 21 F.C.C. Rcd. 10947, 11026, ¶ 205 (2006). Against that measure, there would appear to be substantial doubts as to whether application of Section 227(b)(1) could be justified as a protection against intrusions to residential privacy.

And focusing on today's technology, the *Gomez* panel ignored the dramatic differences between the limited technology associated with residential landlines in 1991, and the sophistication of smartphones in 2014. With the ability on most mobile operating systems to silence notifications for text messages, any intrusion would presumably result from the decision of the user to receive audible notifications of such messages while at home. Against this backdrop, there seems to be little to no basis to conclude that text messages received at home in 2014 constitute an invasion of privacy to the same degree as residential telemarketing calls in 1991.

Federal Common Law Of Vicarious Liability Applies To Section 227(b)(1) Claims. The panel also considered whether Campbell-Ewald could avoid Section 227(b)(1) liability on the ground that it was neither the sender of the text, nor the person on whose behalf the text was sent. The panel disposed of this argument by concluding that federal common law principles of vicarious liability apply to claims under the TCPA, and would potentially support Campbell-Ewald's liability as agent for the Navy.

In reaching this conclusion, the panel decided an issue that another panel of the Ninth Circuit declined to reach earlier this year. *See Thomas v. Taco Bell Corp.*, No. 12-56458, 2014 WL 2959160 (9th Cir. July 2, 2014), discussed in the previous blog post: "Ninth Circuit Affirms Summary Judgment, Taco Bell Not Vicariously Liable for Third-Party Text Message." In contrast to that earlier

and unpublished decision, the *Gomez* panel relied heavily on the FCC's decision in *In re Joint Petition Filed by Dish Network, LLC*, 28 F.C.C. Rcd. 6574 (2013) (*Dish Network*). Indeed, the panel stated, in apparent dictum, that *Dish Network* "must be afforded *Chevron* deference." *Gomez*, 2014 WL 4654478, at *4.

But in so stating, the panel did not cite or otherwise acknowledge the D.C. Circuit Court of Appeals' contrary decision earlier this year, on direct review of the *Dish Network* ruling. As we previously reported, the D.C. Circuit held that the "guidance" portions of the *Dish Network*ruling were not entitled to *Chevron* deference, noting that the FCC itself had so agreed. *See Dish Network, L.L.C. v. Fed. Commc'ns Comm'n*, 552 F. App'x 1 (D.C. Cir. 2014).

To be sure, the *Gomez* panel did not discuss the *Dish Network* ruling in any detail, other than to agree with the FCC's ruling that federal common law of vicarious liability applied to Section 227(b) and Section 227(c) claims. And the panel did not reach the alternative theory of third party liability where a defendant is "closely involved" in placing calls or sending texts. As such, there is ample room for subsequent decisions to shape the contours of vicarious liability in the context of TCPA claims.

National Law Review, Volume IV, Number 275