

Ninth Circuit Confirms That Providing A Business With Phone Number Constitutes Express Consent To Be Called Under The TCPA

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In a recent decision, the Ninth Circuit held that the named plaintiff in a putative TCPA class action expressly consented to receive a text message when she provided an airline with her phone number, even though she claimed she only provided her number because she thought it was required to purchase airline tickets and had no intention of consenting to be contacted. *Baird v. Sabre, Inc.*, No. 14-55293, 2016 WL 424778, at *1 (9th Cir. Feb. 3, 2016).

When Shaya Baird booked flights online, she was prompted to provide contact information and was informed that “[a]t least one phone number is required.” *Baird v. Sabre, Inc.*, 995 F. Supp. 2d 1100, 1101 (C.D. Cal. 2014). Three weeks later, Sabre, which was contracted by Hawaiian Airlines to provide traveler notification services, sent Baird a text message asking if she wanted to receive flight notifications. Baird did not respond and Sabre sent no other messages. Baird subsequently filed a putative class action.

Sabre moved for summary judgment, arguing that Baird consented to be contacted by voluntarily providing her phone number when booking her tickets. Baird opposed, arguing that she did not voluntarily provide her number; rather, she was informed that providing her phone number was mandatory in order to purchase her tickets and she “was not informed or aware that Hawaiian Airlines would consider her act of supplying her cellphone number to constitute consent to receive text messages.” *Id.*

The district court granted Sabre’s motion based on the FCC’s 1992 ruling that “persons who knowingly release their phone numbers have *in effect* given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.” *Id.* at 1102. The district court rejected Baird’s argument that the FCC order contradicted the plain meaning of “express consent” in the TCPA. Rather, the court ruled that under the FCC’s definition of “express consent,” the plaintiff “‘knowingly release[d]’ her cellphone number to Hawaiian Airlines when she booked her tickets, and by doing so gave permission to be called at that number by an automated dialing machine.” *Id.* at 1106 (alteration in original). That Baird felt compelled to provide her phone number when purchasing tickets was inconsequential: “Baird’s act of providing her cellphone number was a

voluntary act; she was not forced to book a flight on Hawaiian Airlines.” *Id.*

The Ninth Circuit affirmed, holding that the FCC’s ruling on what constitutes express consent is presumptively valid, thereby “forclos[ing]” Baird’s argument “that providing her phone number did not constitute prior express consent[.]” 2016 WL 424778, at *1. Rather, the Ninth Circuit held that “Baird expressly consented to the text message in question when she . . . knowingly released her phone number to Hawaiian Airlines while making a flight reservation” without “provid[ing] any instructions to the contrary indicating that she did not want to be reached at that number.” *Id.* (internal quotation marks and alteration omitted).

The decision should provide additional comfort to businesses, and will make it harder for plaintiffs to succeed in cases where they actually provided their phone numbers to the defendant but claim they did not expressly consent to receive calls. Businesses should still carefully review their outbound calling practices, however, because the decision does not expressly address situations that may require prior express *written* consent from the called party.

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