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BLOGS

Vicarious Liability

Ninth Circuit Affirms Finding of No Vicarious Liability for Telephone Consumer Protection Act Violation

The United States Court of Appeals for the Ninth Circuit has affirmed a California district court's dismissal of a vicarious liability claim against a franchisor based on an advertising text message sent by its franchisee. *Thomas v. Taco Bell Corp.*, 2014 U.S. App. LEXIS 12547 (9th Cir. July 2, 2014). The plaintiff, who received the text message advertising a Taco Bell product, alleged violation of the Telephone Consumer Protection Act (TCPA), which makes it unlawful to make automated mass-marketing communications to a cell phone. The text message was a promotion by an association of several Taco Bell store operators in the Chicago area and was sent out by a promotion company hired by an advertising agency representing the association. In addition to Taco Bell, the suit named one of the twelve members of the association, but not the entity that actually administered or sent the text message at issue.

The district court ruled out any direct liability against Taco Bell because it did not send the text message itself, but ruled that vicarious liability could theoretically apply under agency principles. The court found, however, that Taco Bell did not control the manner and the means of the text message campaign, which was controlled by the association, advertising agency, and promotion company. The Ninth Circuit agreed with the analysis under the established vicarious liability standard in which a defendant must be found to control the manner and the means of the alleged wrongful act, and agreed that Taco Bell did not control the campaign. The court did not stop there, as it also analyzed whether principles of apparent authority and ratification could provide a basis for a vicarious violation of the TCPA. The Ninth Circuit rejected that theory as well, finding no apparent authority because the plaintiff could not show reasonable reliance or harm resulting from reliance on anything Taco Bell did or said to her. Finally, the court found that Taco Bell did not ratify the text message because there was no principal-agency relationship, a requirement for ratification.

Related People

Maisa Frank

Partner

Washington, D.C.

202.295.2209

maisa.frank@lathropgpm.com