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Light at the End of the Tunnel for Some Defendants Under the Telephone Consumer Protection Act

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In recent months, three district courts have limited the scope of liability under certain subsections of the Telephone Consumer Protection Act ("TCPA") for defendants who did not themselves send unsolicited calls, texts, or faxes to consumers. These courts concluded that the defendants were not liable for the alleged violations of the TCPA simply because the calls, texts, or faxes were made by another entity on the defendants' behalf, or because defendants funded the allegedly unsolicited marketing communications. These recent cases show increased skepticism by courts of vicarious liability theories under the TCPA, and their reluctance to award the significant statutory damages that are sought in TCPA class actions under indirect liability theories.

On November 27, a district court granted summary judgment for a defendant in a TCPA case involving an allegedly unsolicited fax advertisement. In *Zersen v. PT Insurance Group, et al.*, No. 11 C 7919, 2012 U.S. Dist. LEXIS 167783 (N.D. Ill. Nov. 27, 2012), an individual who had a 50% ownership interest in the defendant, Underwriters, hired an advertising company to send faxes advertising a different company, PT Insurance Group. Despite the fact that Underwriters paid for the faxes and its half-owner had hired the entity that sent the faxes, the court held that Underwriters was not liable under the TCPA because there was no evidence that the half-owner acted on Underwriters' behalf when he arranged for the advertisements promoting a different company.

Zersen follows on the heels of two other district court decisions issued earlier this year. In *Thomas v. Taco Bell Corp.*, No. SACV 09-01907, 2012 WL 3047351 (C.D. Cal. June 25, 2012), the plaintiff sued Taco Bell after receiving an allegedly unsolicited text message authorized by an association that promoted local Taco Bell franchises. Despite the involvement of a Taco Bell representative in the association, and Taco Bell's funding of the text-message campaign, the court held that Taco Bell was not liable under the TCPA. The court found that a defendant may be vicariously liable only if that defendant controlled the manner and means by which the text-message campaign was implemented.

Similarly, in *Mey v. Pinnacle Security, LLC*, No. 5:11CV47, 2012 WL 4009718 (N.D. W. Va. Sept. 12, 2012), the plaintiff filed a putative class action against Pinnacle after receiving an advertisement for Pinnacle's services from an outside vendor Pinnacle had hired. The court held that the relevant provision of the TCPA does not impose liability on a defendant simply because someone else makes an allegedly unsolicited call on the defendant's behalf.

These recent cases reflect a trend toward narrower applications of the TCPA's statutory language, and a reluctance to interpret certain provisions of the Act in ways that expand the scope of liability for defendants that did not themselves send the allegedly unsolicited advertisements. The Federal Communications Commission is also considering petitions for

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a declaratory ruling, which may also limit the scope of indirect liability under the TCPA. The comment period on those petitions formally closed in 2011. The scope of indirect liability will no doubt continue to be the subject of future litigation and regulatory activity.

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