

## ALERTS

### Litigation Alert - Ninth Circuit: Companies Can Be Liable For Third-Party Mobile Marketing TCPA Violations

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On Sept. 19, the U.S. Appeals Court for the Ninth Circuit ruled that companies that hire third parties to send unsolicited text messages can be liable for Telephone Consumer Protection Act (TCPA) violations.

In *Gomez v. Campbell-Ewald Co.*, --- F.3d ---, 2014 WL4654479, the Ninth Circuit reversed and remanded summary judgment in favor of the defendants. In the underlying case, the U.S. Navy hired a marketing company, Campbell-Ewald Co., to conduct a Navy recruitment marketing campaign. In doing so, Campbell-Ewald contracted with a third party, Mindmatics, to send text messages related to the campaign. Mindmatics inadvertently sent text messages to individuals who had not consented to receive such solicitations. In doing so, the court held that vicarious liability under the TCPA extends to those who merely contract for messaging services, even where the company does not send the messages itself.

The Ninth Circuit agreed with several district courts applying the vicarious liability doctrine to text messages under the TCPA. The court also rejected the argument of the defendant that such vicarious liability only extends to merchants whose goods or services are being promoted by the telemarketing campaign. Instead, the court held that the TCPA applies, on its face, to “any party” responsible for sending unsolicited text messages regardless of whether their goods or services are promoted by the text messages. The court made clear that the vicarious liability rules that it had applied to telephone marketing would apply with equal force to the use of text-message marketing.

The *Gomez* decision reconfirms that companies must be cautious when outsourcing telemarketing efforts. *Gomez* demonstrates that anyone in the commercial chain – from the original corporation to an outsourced marketer to a third party electronic marketing firm – can be liable for unwanted telephone calls or text messages. Companies may want to consider hiring marketing firms that are TCPA compliant and ensuring that if any work is outsourced, that firm is also TCPA compliant. Companies should also consider demanding indemnity agreements from every marketer in the chain.

For more information, contact the Barnes & Thornburg attorney with whom you work, or Kevin Rising at [Kevin.Rising@btlaw.com](mailto:Kevin.Rising@btlaw.com) or 310-284-3883 or Devin Stone at [Devin.Stone@btlaw.com](mailto:Devin.Stone@btlaw.com) or 202-371-6351.

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