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Ninth Circuit Holds Franchisor is Not Liable for Franchisee's Text Message Advertising

The federal Telephone Consumer Protection Act ("TCPA") provides, among other things, that both the sender of a text message advertisement that violates the TCPA and the person on whose "behalf" the text message is sent can be liable for statutory damages of at least \$500 per improper text message sent. On July 2, 2014, the United States Court of Appeals for the Ninth Circuit clarified a franchisor's potential liability under the TCPA for the acts of its franchisees, holding that a franchisor could not be held liable for text messages sent by a franchisee advertising association absent proof that the association was the franchisor's actual or apparent agent or of ratification by the franchisor. While the Ninth Circuit did not make a blanket pronouncement that a franchisor can never be liable for a franchisee's TCPA violations, the reasoning of its decision suggests that in the vast majority of circumstances, a franchisor should not be held liable for its franchisee's TCPA violations.

In *Thomas v. Taco Bell*, 879 F. Supp. 2d 1079 (C.D. Cal. 2012), Tracie Thomas filed a putative class action lawsuit against Taco Bell and a Chicago-based Taco Bell franchisee advertising association claiming that text message advertisements sent to her by the association violated the TCPA. Taco Bell argued that it was entitled to summary judgment because it did not send the text messages and because it could not be held vicariously liable for the association's actions under traditional

agency principles. The district court agreed. It first held that there was no proof that Taco Bell sent the text messages at issue. Next, it explained that to satisfy traditional agency principles, Thomas had to prove that the association "acted as the agent of Taco Bell; that Taco Bell controlled or had the right to control them and, more specifically, the manner and means of the text message campaign they conduct." To show the necessary control, Thomas argued that (1) Taco Bell had approved the use of funds from a common franchisee advertising fund for the text message campaign; (2) a Taco Bell employee was on the advertising board; and (3) Taco Bell knew the text messages would be sent as part of an advertising campaign. The district court found that none of these facts demonstrated the necessary level of control and granted summary judgment to Taco Bell.

The Ninth Circuit affirmed the district court's decision in *Thomas v. Taco Bell Corp.*, No. 12-56458 (9th Cir. July 2, 2014). After making clear that a 2013 Federal Communications Commission Declaratory Ruling suggested that TCPA liability could arise not only from actual agency principles, but also apparent agency and ratification, the appellate court affirmed the district court's findings regarding actual agency and went on to conclude that on the facts before it, there was no apparent agency or ratification.