

Great Escape: Corporate Officer Escapes TCPA Liability for Failing to Implement TCPA Compliance Policies



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Wednesday, March 6, 2019

As I have written repeatedly, the TCPA is quite unfair to corporate officers who would usually have no liability for the acts of a corporate entity. In most tort situations, a corporate officers knowledge and participation in a company's illegal conduct would—at most—make the corporation subject to enhanced (punitive) damages, but the corporate officer herself would suffer no personal exposure.

The TCPA is so so very different. TCPAworld is full of stories of individuals facing unfair personal liability for the acts of corporate entities—often to the tune of millions in personal exposure. The most common line of cases holds that if a corporate officer “directly participated” in the illegal fax or call campaign that she may be held liable for those calls as if she made the calls herself. At \$500.00 (minimum) per call those damages can add up fast—and personal liability for treble damages (\$1,500.00 per call) is not unheard of.

Making matters even scarier, a Plaintiff recently sued the CEO of a medical supply company arguing that he was liable for illegal faxes sent by the company merely by virtue of his not implementing TCPA policies! In *Arwa v. Med-Care Diabetic & Med. Supplies*, 14 C 5602, 2019 U.S. Dist. LEXIS 22087 (N.D. Ill Feb 11, 2019) the court was asked to determine whether faxes sent to complete the process of filling orders

previously placed by customers contained advertising materials as defined by the TCPA. The Court held that the faxes were not advertisements to begin with, but also paused to address the allegations against the Defendant's CEO who was being personally pursued in the action. After determining that the corporate officer has no direct participation in the illegal conduct the Court refused to hold him liable merely because he knew the illegal conduct was ongoing.

Most importantly, however, the Court rejected the Plaintiff's argument that the officer was liable for the faxes because he failed to implement TCPA compliance policies. The Court rejected this proposition, however, noting that the case cited by Plaintiff was off point and the *Arwa* court would not abide the expansion of direct liability to so great an extent.

It is also notable that *Arwa* makes mention of *City Select Auto Sales Inc. v. David Randall Assocs., Inc.*, 885 F.3d 154, 159-161 (3d Cir. 2018) wherein the "direct participation or authorization" standard for TCPA liability was "questioned" by the Third Circuit, which suggested that officers should rarely be held liable under the TCPA if acting in their corporate, rather than personal, capacities. As TCPAworlders know, I have been trumpeting *City Select* for some time and it is nice to see a district court outside of the Third Circuit take notice.

So there you have it. Stay safe TCPAworld.

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