Last month, the United States Court of Appeals for the Seventh Circuit clarified the application of common-law vicarious liability principles to TCPA class actions in *Warciak v. Subway Restaurants, Inc.*, 2020 WL 559105 (7th Cir. Feb. 5, 2020). The lawsuit sought to hold Subway liable for promotional text messages sent by T-Mobile to its cell phone subscribers. The court’s opinion explains what is necessary to establish a TCPA defendant’s vicarious liability for the acts of an alleged agent under an “apparent agency” theory.

Plaintiff Matthew Warciak received a text message from T-Mobile as part of the carrier’s “T-Mobile Tuesdays” campaign. The message advertised “a free 6-inch Oven Roasted Chicken sub at SUBWAY, just for being w/ T-Mobile” and included a link to T-Mobile’s website for more information. Rather than claim a free sandwich, Warciak filed suit in federal court. Warciak sued Subway directly for violating the TCPA and Illinois consumer protection law, but he did not name T-Mobile as a defendant (given an arbitration provision in his phone contract).

The district court dismissed Warciak’s class action complaint for failure to state a claim, and the Seventh Circuit affirmed. While the Seventh Circuit acknowledged vicarious liability for TCPA claims under federal common-law agency principles, it nevertheless ruled that Warciak failed to plausibly allege that T-Mobile acted with
apparent authority as Subway's agent. The court emphasized that a commercial contractual relationship between two sophisticated businesses, standing alone, is insufficient to create an agency relationship: “While an agency relationship can be created by contract, not all contractual relationships form an agency relationship.” 2020 WL 559105, at *2. Judge Bauer explained that T-Mobile’s text messages alone could not establish its apparent authority, as such a theory requires a manifestation by the principal (rather than the alleged agent) that the agent is acting on its behalf. Id. The court also highlighted the fact that several features of the message indicated control by T-Mobile, rather than Subway. Id.

Although the Seventh Circuit’s decision is a positive development for businesses facing the specter of draconian statutory damages under the TCPA, the legal analysis remains dependent on the specific factual allegations of each complaint. One can see this by looking at the Central District of California’s recent denial of a motion to dismiss TCPA claims premised on the same text-messaging campaign in Fishman v. Subway Franchisee Advert. Fund Trust, Ltd., 2019 WL 6135030 (C.D. Cal. Nov. 19, 2019). As in Warciak, the court in Fishman ruled that the plaintiff had failed to allege Subway’s apparent authority for the T-Mobile text message, noting the lack of any allegations regarding Subway’s direct statements to plaintiff creating such an appearance. Id. at *6. However, the court did accept the plaintiff’s “actual authority” theory of vicarious liability, given the plaintiff’s allegations that Subway instructed T-Mobile on the content and timing of the text messages. Id. at *5.

Coupled together, the Warciak and Fishman decisions demonstrate that a TCPA plaintiff must plead specific facts showing either (1) that the defendant controlled the alleged agent with respect to calls, text messages, or faxes at issue (to establish actual authority), or (2) that the defendant in some way manifested to the public (or communicated directly to the plaintiff) that the intermediary possessed authority to act as its agent.

Businesses that communicate with consumers through telemarketing calls, text messages, or faxes should consider these recent TCPA decisions, and others, when evaluating their arrangements with third-party vendors and contractual counterparties.

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