BIG TCPA TROUBLE?: Seller Sues Marketer Via Counterclaim for (Allegedly) Supplying Fraudulent TCPA Consent Leading to Class Action Lawsuit

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Well this one is just remarkable.

We reported a while back that a consumer plaintiff’s lawyer was personally suing a lead aggregator contending that leads supplied by the company were fake. Well today we have a cross-complaint filed by a seller against a marketing company alleging that the marketer violated a very clear understanding that ringless voicemails would only be used on consented leads—and then manufactured lead evidence to try to cover up their mistake.

Eesh.

While the assertions of the counterclaim are only at the pleadings stage, if the allegations turn out to be the marketer—Total Marketing Concepts—could be in really hot water. The case is Dickson v. Direct Energy, et al., Case No. 5:18-cv-182 (N.D. Oh.) and the counterclaim is available here: Direct Energy Counterclaim
And here’s what (allegedly) happened:

Direct Energy contracted with TMC to generate some leads. The contract between the parties contained a bunch of very clear representations that TMC would comply with the TCPA and only use technology regulated by the TCPA to reach out to individuals who had provided prior express written consent. So far so good.

At some point TMC approached Direct Energy about using ringless voicemail technology to contacts potential leads. Direct Energy (wisely) refused to allow TMC to do so unless individuals had provided consent. TMC pushed back with three separate opinion letters from their counsel that RVM technology does not trigger the TCPA—who was that lawyer?—but Direct Energy steadfastly maintained its position that RVM could only be used with consent.

So some time passes and some guy Plaintiff named Matthew Dickson gets an RVM from TMC, allegedly on behalf of Direct Energy and decides to sue. Guess what? He claims he did not opt in to receive such calls.

Now we here in TCPAWorld see this sort of thing all the time—some knucklehead trying to manufacture a TCPA lawsuit by claiming he did not visit a website only to have his IP address or other data elements betray him. But this time was different. TMC apparently came forward with data showing that Plaintiff provided consent but discovery demonstrated TMC’s data was fraudulent!

Here’s the key allegation:

In response, TMC sent Direct Energy an Excel spreadsheet of data and a website screenshot that TMC represented was evidence of Plaintiff’s purported opted-in. Recently, in the course of discovery, Direct Energy learned that TMC’s documentation was faked and its representations false. TMC employees manufactured the “Dickson opt-in” and fraudulently passed it off to Direct Energy claiming that it was legitimate—it was not.

Eesh. Ouch. Say it ain’t so.

The counterclaim goes on to allege that although Direct Energy paid TMC to obtain third-party verified consent—from TrustedForum—TMC never actually obtained those services (although it told Direct Energy it had) and apparently pocketed the money instead. Plus TMC kept using RVM technology to contact leads long after it told Direct Energy it had ceased doing so.

This is just brutal. I’m already on record that any marketer or lead aggregator that is selling phony data or fraudulently manufacturing leads is going to get caught and is going to end up out of business (or worse.) Do NOT run these sorts of risks folks. And if you’re a lead buyer you MUST know who you are doing business with—it’s just too dangerous a (TCPA)world out there not to be vetting the sources of your lead traffic.

The Direct Energy cross-complaint is particularly compelling because the seller (allegedly) did a ton of diligence here and really dug into the operations of the marketer and put very firm controls in place—yet the marketer still (allegedly)
violated the law and then (way worst of all) decided to cover its tracks by manufacturing evidence. My goodness is this a grim tale. For everyone’s sake I hope it isn’t true.

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