Vicarious Liability May Apply: TCPA-Compliant Text Message Advertising in Franchise Systems

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Since the turn of the century, businesses, including franchises, have been using text messaging as a means of advertising with more and more frequency. Text message advertising campaigns have become a normal part of business for franchisees and franchisors with the method of implementation varying by system. Some franchisors encourage their franchisees to contract with suggested or approved third-party messaging companies. Alternatively, franchisees may organize text message advertising campaigns through regional cooperatives, or franchisees (and to a lesser degree, franchisors) may decide to embark on their own text message advertising.

Text message advertising for commercial purposes falls under the ambit of the Telephone Consumer Protection Act (TCPA), which protects consumers from receiving unwanted and unsolicited communications. Because text message communications are regulated, businesses—including franchises—need to take care to comply with the law in conducting text message advertising campaigns. Compliance can prove challenging, however, because the law in this area is still developing. This is particularly true for franchisors, which may have only an indirect connection through their franchisees or through third-party vendors to the messages being sent, yet may still be named in lawsuits as a party responsible for sending the messages.

This article will review potential pitfalls in conducting TCPA-compliant text message advertising campaigns. It will begin by providing an overview of the TCPA, including its origin, interpretation, and enforcement. The article will then detail several recent TCPA cases involving franchises and discuss

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the theories of liability for franchisees and franchisors. Finally, the article will highlight ways in which franchisors may attempt to ensure compliance with the TCPA in the use of text message advertising by their franchisees. Text message communications can be a highly effective method for engaging consumers, and businesses are not likely to curb their use. Thus, it is important to understand how to best comply with the TCPA's regulations on text message advertising.

I. Background of the Telephone Consumer Protection Act

A. *Genesis of the TCPA*

In the late 1980s, advances in technology enabled companies to seek out consumers in mass. Companies gained the ability to automatically dial consumers and deliver prerecorded telephone messages, using a technology known as robocalling. The industry expanded quickly, and spending on telemarketing activities increased from $1 billion to $60 billion between 1981 and 1991.[1] By the mid-1990s, telemarketing accounted for more than $450 billion in annual sales of goods and services.[2] At the time, marketers also took advantage of another new piece of technology—the facsimile machine. Marketers used this new tool to send tens of thousands of unsolicited advertisements and offers, known as junk faxes, to businesses and consumers across the country.

By the early 1990s, consumers were becoming fed up with telemarketing. In one year alone, the Federal Communications Commission (FCC) received more than 2,300 complaints about telemarketing calls.[3] More than forty states enacted legislation aimed at curbing unsolicited telemarketing, but the laws had a limited effect because states did not have jurisdiction over interstate calls.[4] This led states to express their "desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions."[5]

In response to the concerns of consumers and state legislators alike, Congress decided to address robocalls and junk faxes through federal legislation. The TCPA was enacted to "protect privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls . . . and to facilitate interstate commerce by restricting certain uses of facsimile machines and automatic dialers."[6] The TCPA provided a statutory framework and tasked the FCC with interpreting and enforcing the law.[7]

1. *See* Spencer Weber Waller, *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 Loy. Consumer L. Rev. 343, 352 (2014).
2. *Id.*
3. S. Rep. No. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970.
4. *Id.* at 3.
5. *Id.*
6. *Id.* at 1.
7. *See generally* 47 U.S.C. § 227.

The TCPA requires telemarketing companies using autodialing systems to "automatically release the called party's line within 5 seconds of the time that the calling party's system is notified of the called party's hang-up."[8] Further, it provides that "all artificial or prerecorded telephone messages delivered by an 'autodialer' must clearly state the identity of the caller at the beginning of the message and the caller's telephone number or address during or after the message."[9] The TCPA also prohibits any person within the United States, or any person calling a recipient within the United States, from using any automatic telephone dialing system to call a cell phone or other number where the recipient is charged for the call.[10] The term "automatic telephone dialing system" has been interpreted to include any device with the capacity to store or produce telephone numbers to be called in a particular order, whether numbers actually are stored or called in order.[11]

In a 1992 TCPA Order, the FCC outlined technical requirements for do-not-call lists and telemarketing practices and created the first exemption for parties with an established business relationship (EBR) with a consumer.[12] The EBR exemption rested on the idea that a solicitation from someone who already had a business relationship with the consumer would not invade that consumer's privacy.[13] The Order also listed acceptable hours in which telemarketers could make calls.[14] In addition, the FCC amended its regulations to make it "unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."[15] Unlike robocalls, the new regulations provided for an absolute ban on unsolicited facsimile advertisements and did not grant the FCC the authority to carve out exceptions. However, the FCC determined that faxes sent to entities with an EBR would be "deemed to be invited or permitted by the recipient."[16]

B. *FCC Regulation and Interpretation of the TCPA*

Since 1992, the FCC has continued to expand its role in interpreting and enforcing the TCPA. In 2003, the FCC revised its TCPA rules to establish a national do-not-call registry in a partnership with the Federal Trade

8. Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 8752, 8778 ¶ 52 (1992).

9. *Id.* at 8779 ¶ 53.

10. 47 U.S.C. § 227(b)(1)(A) (2012).

11. *See* Meyer v. Portfolio Recovery Assocs., LLC, 707 F.3d 1036, 1043 (9th Cir. 2012) (citing Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 951 (9th Cir. 2009)).

12. *See* Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. at 8769–71 ¶¶ 33–35.

13. *Id.* at 8770–71 ¶ 34.

14. *Id.* at 8767–68 ¶ 26 (stating that calls are prohibited before 8:00 a.m. and after 9:00 p.m. local time of the consumer's location).

15. *Id.* at 8793, App. B.

16. *Id.* at 8779 ¶ 54 n.87.

Commission (FTC).[17] The registry is nationwide and covers all telemarketers with the exception of some nonprofit organizations. The registry went into effect on October 1, 2003, and applies to all interstate and intrastate calls.[18] Consumers can register phone numbers for free, and registration has prevented a large majority of unwanted telemarketing calls.[19]

As technology has changed, marketers have found new ways to reach consumers. With the pervasive nature of cellular phones, text messaging has become a frequent means of communication. Pew Research Center reported that, as of October 2014, 64 percent of American adults own a smartphone and 90 percent own a cell phone.[20] In April 2012, a Pew Research Center study found 79 percent of cell phone owners use text messaging.[21] Of those using text messaging, 69 percent reported getting unwanted spam or text messages with 25 percent saying they received spam or unwanted texts at least once weekly.[22] In addition to the text messages, 68 percent of cell phone owners reported getting unwanted sales or marketing calls.[23]

As early as 2003, the FCC interpreted the TCPA's ban on autodialers to encompass both voice calls as well as text messaging.[24] In 2009, the Ninth Circuit agreed with the FCC's determination that the TCPA applied to text messages, holding that Congress intended "to call" to mean "to communicate with a person by telephone."[25] More recently, in a Report and Order approved on February 15, 2015, the FCC adopted additional protections for consumers receiving unwanted robocalls or marketing text messages.[26] The two most significant changes included the requirement that prior to making a call or texting, a business must obtain written consent from the consumer,[27] and the elimination of the EBR defense for certain calls to residential phone lines.[28] These changes took effect in October 2013 and what they mean in practice for businesses remain uncertain.

For example, following the October 2013 Report and Order, many questions remained regarding what constitutes written consent.[29] The Mobile Marketing Association submitted a petition for declaratory ruling asking

17. FCC, *Telemarketing and Robocalls*, FCC ENCYCLOPEDIA, *available at* https://www.fcc.gov/encyclopedia/telemarketing (last visited July 31, 2015).
18. *Id.*
19. *Id.*
20. Pew Internet Project, *Mobile Technology Fact Sheet*, PEW RESEARCH CTR., *available at* http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/ (last visited July 31, 2015).
21. *Id.*
22. *Id.*
23. *Id.*
24. *See In re* Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 Report and Order, FCC 03-153 ¶ 165 (July 3, 2003).
25. Satterfield v. Simon & Schuster, Inc., 569 F.3d 946 at 952, 954 (9th Cir. 2009).
26. *See In re* Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 Report and Order, FCC 12-21 (Feb. 15, 2015).
27. *Id.* ¶¶ 20–35.
28. *Id.* ¶¶ 35–44.
29. Marc S. Roth, *TCPA Compliance Remains a Headache for Marketers*, LUXURY DAILY (Jan. 22, 2015), http://www.luxurydaily.com/tcpa-compliance-remains-a-headache-for-marketers/.

the FCC to explicitly state that the new TCPA rules do not require companies to re-ask consumers who previously gave written consent to re-opt in to receive mobile communications from businesses.[30] A petition submitted by a different company asked the FCC to confirm that parties are not liable under the TCPA for placing calls to reassigned numbers where the caller had prior consent for a number before it was reassigned.[31] Similarly, another company recently submitted a petition asking the FCC to confirm whether and how prior consent may be revoked, while another petitioned the FCC to consider whether consent may be given through intermediaries.[32]

The TCPA continued to make headlines when the FCC chairman circulated a proposal in late May 2015 designed to close loopholes and encourage wireless providers to do more to block unwanted telemarketing calls and spam text messages.[33] Following the proposal, on July 10, 2015, the FCC issued an omnibus Declaratory Ruling and Order that addresses the petitions of twenty-one companies and trade associations, including those mentioned above, for clarification of various provisions of the TCPA.[34] Importantly, the FCC ruled that companies that have written consent from customers which does not comply with the post-2013 rules do need to re-ask their customers for new consent that complies with the rules.[35] However, it also granted the petitioners and their members a retroactive waiver from October 16, 2013 (the effective date of the 2013 Report and Order) through eighty-nine days following the release of the July 10, 2015, Declaratory Ruling.[36] With regard to reassigned numbers, the FCC clarified that the TCPA requires the consent of the current subscriber so companies can be liable for texting a number at which the previous subscriber consented to receive information, but which has been reassigned to a new consumer.[37] The FCC

30. Cara Frey, *TCPA Update: MMA Coalition Files Petition*, MOBILE MKTG. ASS'N (Oct. 29, 2013, 1:52 PM), http://www.mmaglobal.com/blog/TCPA-Petition.

31. *In re* United Healthcare Servs., Inc.'s Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 3 (filed Jan. 16, 2014).

32. *See In re* Santander Consumer USA, Inc.'s Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 1 (filed July 10, 2014); *In re* TextMe, Inc.'s Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278, at 10 (filed Mar. 18, 2014); *In re* Glide Talk, Ltd.'s Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 13 (filed Oct. 28, 2013).

33. Jennifer C. Kerr, *FCC Takes Aim at Annoying Telemarketing Calls*, ASSOCIATED PRESS (May 27, 2015, 6:39 PM), http://bigstory.ap.org/article/a460f691721e4ddca139deba657e7858/fcc-takes-aim-annoying-telemarketing-calls.

34. *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 Declaratory Ruling and Order, FCC 15-72 (July 10, 2015).

35. *Id.* ¶ 100. The FCC also ruled on a number of other important issues, particularly the meaning of the term "autodialer." Although the ruling did not change the general understanding that the term refers to a piece of equipment that has the capacity to make calls without human intervention, it clarified that the capacity to make calls included equipment that required a software update to do so. *Id.* ¶¶ 15, 20. The ruling also determined that parties cannot circumvent the definition of autodialer by separating the storing and dialing functions into two different companies. *Id.* ¶ 23.

36. *Id.* ¶ 102.

37. *Id.* ¶ 72.

also stated that companies would have essentially one free call after the reassignment of a number, the purpose of which is to gain knowledge of the reassignment; however, after the one call, the FCC will deem the company to have constructive knowledge of the reassignment, even if it does not have actual knowledge.[38]

In addition, the ruling made clear that consumers may revoke their consent to receive calls at any time through any reasonable method "that clearly expresses his or her desire not to receive further calls" and stated that consumers are not limited to using only a revocation method that the caller has established.[39] Finally, the FCC clarified that while the TCPA does not prohibit a caller or texter from obtaining a consumer's prior express consent through an intermediary, the intermediary may convey only consent that was previously obtained.[40]

The 2015 Declaratory Ruling is already the subject of several appeals that have been consolidated in the U.S. District Court for the District of Columbia.[41] While the debate will continue, it remains clear that the FCC has and will continue to take seriously its role in interpreting and enforcing the TCPA.

C. *Enforcement of the TCPA*

The TCPA provides for three enforcement mechanisms: a private right of action for consumers, a civil lawsuit brought by a state attorney general (or other qualified agency), and the ability of the FCC to impose monetary fines against violators.[42] Consumers bringing a lawsuit under the TCPA may seek damages of $500 per violation or actual monetary loss, whichever is greater.[43] Damages can also be trebled for willfulness,[44] and they are not limited or capped in class action lawsuits. Since the U.S. Supreme Court's decision in *Mims v. Arrow Financial Services LLC*, class action litigation under the TCPA has expanded drastically.[45] By 2013, class action litigation under the TCPA rose by approximately 70 percent and rose again by over 32 percent in the first half of 2014.[46] As one commentator noted, the TCPA "has become fertile ground for nuisance lawsuits because class action lawyers are often rewarded with quick settlements, even in cases without merit, simply because litigation uncertainty and the potential financial exposure" is too great a risk for a business.[47]

38. *Id.*
39. *Id.* ¶ 70.
40. *Id.* ¶ 49.
41. *See* Consolidation Order, *In re* Fed. Commc'ns Comm'n, Case MCP No. 134 (J.P.M.L. July 24, 2015), ECF No. 3.
42. *See* 47 U.S.C. § 227 (b)(3) (2012); 47 U.S.C. § 227(f); 47 U.S.C. § 503.
43. *See* 47 U.S.C. § 227(b)(3).
44. 47 U.S.C. § 227(b)(3).
45. 132 S. Ct. 740 (2012).
46. Paul F. Cochran, Marc J. Rachman & David S. Greenberg, *The Telephone Consumer Protection Act: Privacy Legislation Gone Awry?*, 26:10 INTELL. PROP. & TECH. L.J. 9, 9 (2014).
47. *Id.*

II. TCPA Cases Involving Franchises

Like all business owners, franchisees have increasingly relied on robocalls and text messages as part of their marketing strategies. As their use of these advertising measures has grown, so too has their exposure under the TCPA. Several recent class action lawsuits brought under the TCPA have involved the dissemination of blast text messages by third-party marketing agencies working on behalf of franchisees. Franchisors have also been named as defendants in these actions on theories of both direct and vicarious liability, raising serious questions about the statute's intended reach.

A. *Vicarious Liability*

Because it is common for retailers to hire third-party vendors to assist in marketing their products and services, vicarious liability principles play a central role in many TCPA cases.[48] With certain exceptions, § 227(b) of the statute prohibits unauthorized telemarketing calls made to cellular or residential telephone lines using automatic telephone dialing systems or artificial or prerecorded voices.[49] Another section of the statute, § 227(c), prohibits telephone solicitations to residential telephone subscribers who have registered their telephone numbers on the national "do-not-call" registry.[50] The TCPA creates separate private rights of action for violations of the calling prohibitions contained in § 227(b) and the do-not-call restrictions contained in § 227(c). With respect to the prohibitions contained in § 227(b), the statute provides a private right of action to any person for "a violation of this subsection."[51] With respect to the do-not-call restrictions, the statute provides a private right of action to any person who has received repeated calls "by or on behalf of the same entity."[52] Consumers have invoked both sections of the statute to seek to hold franchisors liable for robocalls and text messages transmitted by their franchisees or by telemarketing firms hired by their franchisees. As a result, courts have been called upon to determine the circumstances under which a person or entity who does not actually place illegal calls may nevertheless be liable under the TCPA for solicitations initiated by third parties.

48. Courts have interpreted the TCPA to include vicarious liability principles, even though the express language of the statute does not speak to the issue. *See* Bridgeview Health Care Ctr. Ltd. v. Clark, No. 09-cv-5601, 2013 WL 1154206, at *5 (N.D. Ill. Mar. 19, 2013) ("[W]hen Congress creates a tort action, 'it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules.'" (quoting Meyer v. Holley, 537 U.S. 280, 285 (2003)).

49. 47 U.S.C. § 227(b)(1)(A)(iii), (B) (2012).

50. 47 U.S.C. § 227(c)(3)(F); *see also* 47 C.F.R. § 64.1200(c)(2) (implementing the statutory prohibition).

51. 47 U.S.C. § 227(b)(3).

52. 47 U.S.C. § 227(c)(5).

1. Traditional Agency and Beneficiary Theories

Applying traditional agency principles, several federal courts have declined to hold franchisors liable under the TCPA for telemarketing campaigns administered by their franchisees, even where franchisors have arguably benefitted from the solicitations. In *Thomas v. Taco Bell Corp.*,[53] for example, the U.S. District Court for the Central District of California granted summary judgment in favor of Taco Bell Corp., the franchisor, after concluding that the plaintiff had not shown that Taco Bell was directly involved in a text message promotion organized by a local advertising association comprised of its franchisees. The association retained an advertising agency, which then contracted with a text messaging service provider, for the purpose of marketing a sweepstakes contest through spam text messages. The plaintiff alleged that she and putative class members received unauthorized text messages as part of that promotion in violation of § 227(b) of the TCPA.[54]

The court first held that the TCPA imposes liability only on someone who personally sends a text message in the method proscribed by the statute or someone who was in an agency relationship with the person who sent the text message such that traditional standards of vicarious liability apply.[55] Citing § 227(c)(5) of the statute, the plaintiff argued that the TCPA also imposes liability on anyone on whose behalf the text message was sent, i.e., any party that receives a benefit from the text message.[56] The court concluded that the language in § 227(c)(5) dealing with penalties for multiple illegal calls was irrelevant in this case because that section of the statute did not form the basis of the plaintiff's lawsuit.[57] The court held that to succeed against Taco Bell, the plaintiff had to show that Taco Bell could be held vicariously liable,[58] which required her to demonstrate that the franchisee association, the advertising agency, and the service provider acted as its agents and that it controlled or had the right to control the "manner and means" of the text message campaign they conducted.[59] In finding that Taco Bell could not be held vicariously liable under that standard, the court determined that the plaintiff had failed to establish that Taco Bell controlled any aspect of the campaign:

> Ms. Thomas did not present any evidence to the Court that Taco Bell directed or supervised the manner and means of the text message campaign conducted by the

53. 879 F. Supp. 2d 1079 (C.D. Cal. 2012), *aff'd*, 582 F. App'x 678 (9th Cir. 2014).
54. *Id.* at 1082–83.
55. *Id.* at 1084.
56. *Id.*
57. *Id.*
58. Direct liability was inapplicable to Taco Bell; the parties did not dispute that the service provider was the actual sender of the text messages at issue. *Id.*
59. *Id.* at 1084. The court noted that a party can also be vicariously liable if it is an alter ego of the party engaging in wrongdoing. *Id.* at 1084 n.4. However, the plaintiff had not asserted liability based on an alter ego theory and did not present any evidence that the franchisee association was a "mere instrumentality" of Taco Bell such that Taco Bell's corporate veil could be pierced. *Id.*

> Association, and its two agents, ESW and ipsh!. She presented no evidence to the Court that Taco Bell created or developed the text message. Nor did she present any evidence to the Court that Taco Bell played any role in the decision to distribute the message by way of a blast text. All of this control over the manner and means of the text message campaign was exercised by the Association, ESW, and Ipsh, and Ms. Thomas has not presented any evidence to the Court demonstrating that Taco Bell controlled the actions of these entities with respect to the campaign. Taco Bell, simply put, had nothing to do with it.[60]

The plaintiff argued that Taco Bell's marketing policies, pursuant to which it would pay the invoices of vendors to the local association in certain instances, demonstrated that Taco Bell retained control over the association.[61] The court rejected that argument, holding that even if Taco Bell authorized the release of its own funds for the campaign, that type of "purse strings" theory did not establish that Taco Bell controlled the campaign's design and execution.[62] The court emphasized that "knowledge, approval, and fund administration" did not amount to the type of direction and supervision that would be required to impose vicarious liability.[63]

On appeal, the Ninth Circuit unanimously affirmed the lower court's decision, but cautioned that it was not appropriate to limit vicarious liability to the circumstances of the classic principal-agent scenario and that principles of apparent authority and ratification may also provide a basis for vicarious liability under the TCPA.[64] In so holding, the Ninth Circuit expressly adopted a declaratory ruling issued by the FCC in May 2013, after the district court's grant of summary judgment in Taco Bell's favor.[65] Applying the

60. *Id.* at 1085.
61. *Id.*
62. *Id.*
63. *Id.* at 1086.
64. 582 F. App'x 678, 679 (9th Cir. 2014).
65. *Id.* (citing *In re* DISH Network, LLC, 28 FCC Rcd. 6574, 6590 n.124 (2013)). The FCC's declaratory ruling was prompted by then-pending federal lawsuits filed against the DISH Network in response to telemarketing calls made by the company's third-party vendors. In responding to petitions from the DISH Network, the FTC, and the attorneys general of four states, the FCC considered the circumstances under which a person or entity can be held liable for telemarketing violations committed by third parties that act on the person's or entity's behalf. *In re* DISH Network, LLC, 28 FCC Rcd. at 6578–79. Some of the petitioners took the position that the "on behalf of" language in 47 U.S.C. § 227(c) of the statute should be interpreted according to its plain meaning and that there was no basis to import federal common law agency principles into the provision's construction. *Id.* at 6580-81. Under their proposed construction, the dictionary definition of "on behalf of" would hold a seller like the DISH Network strictly liable for violations of both 47 U.S.C. § 227(b) (relating to cellular and prerecorded calls) and 47 U.S.C. § 227(c) (relating to do-not-call restrictions) "so long as the call is made simply to aid or benefit the seller." *Id.* at 6585. The FCC expressly rejected that interpretation for purposes of its declaratory ruling, instead finding that vicarious liability for violations of 47 U.S.C. § 227(b) and 47 U.S.C. § 227(c) committed by third-party telemarketers will attach only in situations where federal common law agency principles apply. *Id.* at 6584. The FCC opined that under these principles, vicarious liability can arise not only as the result of a formal agency relationship in which the principal controls the agent, but also in the context of an apparent agency relationship or ratification. *Id.* at 6590 n.124. In its recent declaratory ruling issued in July 2015, the FCC reiterated this statement. It then noted that "none of the petitions addressed in this Declaratory Ruling raise the issue of vicarious liability and we do not address it." *In re*

standard promulgated by the FCC, the Ninth Circuit determined that apparent authority and ratification theories were inapplicable on the record before it.[66] The court reasoned that apparent authority can be established only if a plaintiff shows that he or she reasonably relied on something said or done by the alleged principal; the plaintiff in *Thomas* had not shown that she reasonably relied to her detriment on any representation by Taco Bell that the franchisee association, the marketing agency, or the service provider were authorized to act on its behalf.[67] The court further concluded that ratification still requires the existence of a principal-agent relationship, which the plaintiff had not established.[68]

Other courts have taken a similarly narrow view of the TCPA's reach. In *Friedman v. Massage Envy Franchising LLC*,[69] the plaintiffs claimed that they received unlawful spam advertisements via text message and that those messages originated from a service provider acting at the direction of Massage Envy Franchising and two of its franchisees.[70] In granting the franchisor's motion to dismiss the complaint, the court held that the plaintiffs had not sufficiently pled an agency relationship between Massage Envy and the service provider and that they had therefore failed to state a plausible claim that Massage Envy could be held vicariously liable.[71] According to the court, the plaintiffs were required to plead the elements of formal agency as established by the Civil Code of California, including the right of the principal to control its agent.[72] As in the *Thomas* case, the court also rejected the plaintiffs' argument that liability under the TCPA should be extended to any beneficiary of the alleged unlawful conduct, instead finding that the plain language of the statute assigns liability only to the party who "makes" the call.[73] The court further suggested that the plaintiffs lacked standing to pursue a TCPA claim against the franchisor because they had not shown any "causal relation-

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 Declaratory Ruling and Order, FCC 15-72, ¶ 27 n.96 (July 10, 2015). Notably, the May 2013 ruling also provided examples of situations that might give rise to a finding of apparent agency, such as when a seller allows an "outside sales entity to enter consumer information into the seller's sales or customer systems as well as the authority to use the seller's trade name, trademark, and service mark." *In re* DISH Network, LLC, 28 FCC Rcd. at 6592.

66. 582 F. App'x at 679–80.

67. *Id.*

68. *Id.* at 680.

69. No. 3:12-cv-02962, 2013 WL 3026641 (S.D. Cal. June 13, 2013).

70. *Id.* at *1–2.

71. *Id.* at *3. The court did not address whether the franchisor had an agency relationship with the franchisee, including whether the franchisor had the right to control the franchisee's marketing or approve its marketing plan. Although it would have been an interesting inquiry, the court did not have the occasion to consider it.

72. *Id.* (concluding that the plaintiffs' mere assertion that the message sender "was acting as an agent and/or employee of Defendants" was insufficient to establish an agency relationship under federal pleading standards). The court's suggestion that plaintiffs must demonstrate the right of the defendant to control the message sender arguably contradicts the FCC's conclusion in its May 2013 declaratory ruling that vicarious liability can also arise in the context of an apparent agency relationship or ratification.

73. *Id.* at *4.

ship" between the sending of the text messages and the actions of the franchisor, such that their alleged injury was not "fairly traceable" to the franchisor.[74]

2. Marketing Policies

Despite the more rigorous agency standard employed in some TCPA cases, a plaintiff's allegation that a franchisor requires its franchisees to engage in marketing campaigns may nevertheless be sufficient to state a TCPA claim against the franchisor at the initial stages of a case. For example, in *Spillman v. Domino's Pizza, LLC*,[75] the plaintiff alleged that a multiunit Domino's franchisee violated the TCPA by initiating multiple prerecorded voice calls to residential and cellular telephone lines over a four-year period without prior consent.[76] The franchisee had hired third-party vendors to make the telemarketing calls to advertise promotional offers redeemable at two of its stores.

The plaintiff also named Domino's Pizza, LLC, the franchisor, as a defendant on the grounds that Domino's had sufficient control over the franchisee to render Domino's vicariously liable for the unsolicited calls and that Domino's received a direct benefit from the franchisee's telemarketing.[77] In moving to dismiss the complaint, Domino's argued that the plaintiff failed to allege that Domino's transmitted any of the calls or caused them to be transmitted.[78] However, the complaint alleged that the franchisee, by virtue of its franchise relationship, was obligated to engage in advertising and marketing campaigns to sell Domino's pizzas.[79] The complaint also set forth a script of the telephone calls that specifically named Domino's and provided the recipient with ways to reach Domino's.[80] Accepting those facts as true and construing the allegations in the light most favorable to the plaintiff, the court concluded that the complaint sufficiently alleged that the calls were either placed by Domino's or by a mandate of Domino's and denied the motion to dismiss on that basis.[81]

74. *Id.* The court also held that the plaintiffs failed to meet applicable pleading standards because their complaint lacked any factual support for their allegation that the defendants had sent the text messages at issue using an automatic telephone dialing system. The court concluded that the text messages received by each plaintiff were similar in content but differed enough to appear as if an automatic system had not been utilized and that the plaintiffs had merely alleged that the messages were generic and impersonal, not that they came from any short message service code registered to the defendants. *Id.* at *3. On those facts, the court found that it was "just as conceivable that the text messages were done by hand, or not using an ATDS." *Id.* at *2.

75. No. 10-cv-00349, 2011 WL 721498 (M.D. La. Feb. 22, 2011).

76. *Id.* at *1.

77. *Id.* at *2.

78. *Id.*

79. *Id.* at *3.

80. *Id.* at *3–4.

81. *Id.* Domino's subsequently moved for summary judgment seeking complete dismissal of all claims against it on the grounds that it did not exercise day-to-day control over the franchisee's telemarketing practices. Memorandum in Support of Domino's Pizza LLC's Motion for Summary Judgment, Spillman v. Domino's Pizza, LLC, No. 10-cv-00349 (M.D. La. May 21,

B. *Direct Liability*

Holding a franchisor liable under the TCPA becomes more plausible when a plaintiff can allege that the franchisor played an active role in orchestrating the allegedly unlawful text message or telephone call. In *Agne v. Papa John's International, Inc.*,[82] the plaintiff alleged that Papa John's, the national franchisor, a group of its franchisees, and a marketing company hired by those franchisees violated the TCPA when they sent her and thousands of other consumers unsolicited text messages advertising Papa John's pizza products.[83] The text message advertising program was offered and run by a third-party marketer that had instructed the franchisees that it was legal for them to send text message advertisements without express customer consent because they shared an existing business relationship with their customers.[84] The franchisees provided the marketer with lists of telephone numbers associated with individuals who had purchased pizza from them, pulling this information from their point-of-sale systems.[85] The plaintiff claimed that Papa John's was also liable for any TCPA violations because it either directed, encouraged, and authorized its franchisees to contract with the marketer or because it was vicariously liable for the conduct of its franchisees.[86]

In opposing the plaintiff's motion for class certification, Papa John's denied that it had any involvement with the text message advertising campaign and asserted that the plaintiff lacked standing because her injury could not be fairly traced to it.[87] The court declined to dismiss Papa John's from the case and found sufficient evidence to support the plaintiff's allegations, including testimony and emails suggesting that Papa John's, through its local franchise business directors, had encouraged franchisees to try the marketer's text blast services.[88] The court also found evidence that Papa John's had allowed the marketer to promote its services to franchisees at a national conference organized by the franchisor.[89] The court concluded that whether Papa John's had any involvement in franchisee-level decisions to contract with the marketer, and, if so, the extent of that involvement was "a central and disputed issue" in the case that was not appropriate to resolve under the guise of deciding whether the plaintiff had standing to pursue her claims.[90]

2012), ECF No. 156–56. The motion remained pending when the parties ultimately reached a settlement pursuant to which the franchisee and its insurer agreed to pay the consumer class approximately $9.75 million in the form of cash and merchandise vouchers. Settlement Agreement, Spillman v. Domino's Pizza, LLC, No. 10-cv-00349 (M.D. La. Nov. 7, 2012), ECF No. 222–23.

82. 286 F.R.D. 559 (W.D. Wash. 2012).

83. *Id.* at 561.

84. *Id.* at 562.

85. *Id.*

86. *Id.* at 562–63.

87. *Id.* at 564.

88. *Id.*

89. *Id.*

90. *Id.* The court also noted that after receiving numerous customer complaints, Papa John's had issued a memorandum to its corporate stores and franchisees advising them that the practice of sending unsolicited messages to mobile devices was most likely illegal and directing all fran-

Similarly, the liability of businesses that directly engage the services of telemarketers appears to be fairly settled at this point. For example, in *In re Jiffy Lube International, Inc.*,[91] several class action lawsuits were filed against a Jiffy Lube franchisee after the franchisee sent promotional text messages to more than 2.3 million consumers through a third-party marketing vendor.[92] The cases were eventually consolidated, and the franchisee moved to dismiss the master complaint on the grounds that it had only engaged the marketer to conduct the campaign and had not physically sent the messages at issue.[93] The court denied the franchisee's motion, holding that the TCPA recognizes liability for any party responsible for unauthorized text messages, regardless of which entity physically sends the messages.[94] The court reasoned that to hold otherwise would permit the franchisee "to make an end run around the TCPA's prohibitions."[95] According to the court, the complaint set forth plausible factual allegations that the franchisee had directed the mass transmission of the text messages and contained sufficient detail to survive a motion to dismiss.[96]

III. Best Practices for Conducting Text Message Advertising

These cases reinforce the notion that franchisors may be able to minimize their risk of liability under the TCPA if they do not facilitate or direct any franchisee telemarketing or texting promotion. Franchisors that mandate

chisees that had shared customer data with the marketer at issue to take all steps necessary to reclaim that data. *Id.* at 563. Papa John's had also sent a letter directly to the marketer in which it demanded that the marketer delete all customer data supplied by Papa John's franchisees. *Id.* A few months later, in May 2013, the parties reached a settlement valued at approximately $16.5 million, including $11 million in cash payments to members of the consumer class, $2.86 million in merchandise vouchers, and $2.45 million in attorney fees and costs. Unopposed Motion for Preliminary Approval of Class Action Settlement, Agne v. Papa John's Int'l, Inc., No. 2:10-cv-01139 (W.D. Wash. May 17, 2013), ECF No. 371.

91. 847 F. Supp. 2d 1253 (S.D. Cal. 2012).

92. *Id.* at 1255–56.

93. *Id.* at 1256.

94. *Id.* at 1256–58.

95. *Id.* at 1257 (quoting Account Outsourcing, LLC v. Verizon Wireless, 329 F. Supp. 2d 789, 806 (M.D. La. 2004)).

96. *Id.* at 1258. The franchisee was also unsuccessful in moving to compel arbitration. Following the denial of the franchisee's motions, the parties were ordered to attend a mediation conference and ultimately reached a settlement valued at between $35 million and $47 million in cash and merchandise vouchers. The franchisee also consented to the entry of an injunction prohibiting it from sending or directing the sending of any commercial text message unless each potential text message recipient expressly gave prior consent to receive such messages. Final Approval of Class Action and Order of Dismissal with Prejudice, *In re* Jiffy Lube Int'l, Inc., No. 3:11-md-02261 (S.D. Cal. Feb. 20, 2013), ECF No. 97. *See also* Van Patten v. Vertical Fitness Grp., LLC, 22 F. Supp. 3d 1069, 1078 (S.D. Cal. 2014) (granting summary judgment in a franchisor's favor in a lawsuit initiated under the TCPA where the franchisor had engaged and paid a marketing company to develop a text message campaign to announce that certain Gold's Gyms were becoming part of the franchisor's brand, but only where the franchisor was able to succeed on its affirmative defense that the plaintiff had consented to receiving the texts at issue when he provided his phone number on a gym membership application).

their franchisees' participation in text messaging programs and require the use of a particular provider are likely to encounter more potential liability. Yet even franchisors that merely encourage the use of a text messaging campaign or a particular advertising vendor may open themselves up to liability. Ultimately, these considerations will need to be weighed against the benefit of conducting text message advertising and the risk that the advertising will run afoul of the TCPA.

To the extent that franchisors encourage their franchisees to engage in text message advertising or advise them on the practice, they should encourage their franchisees to scrupulously follow the law and the guidance of the FCC and to work with vendors that do so as well. A franchisor's decision to dictate or approve its franchisees' use of particular vendors or the content of particular text message advertisements may provide a sufficient factual predicate for claims of liability under the TCPA. Accordingly, franchisors will need to consider whether controlling specific aspects of text message advertising campaigns administered by their franchisees is truly necessary to protect their trademarks and goodwill. Similarly, franchisors and franchisees that send text messages to consumers should take care to adhere to the FCC's rules and to understand the law's exemptions and exceptions. In particular, companies should be sure to collect from consumers and maintain written consent to receive text messages that complies with the current rules. If a company had previously obtained written consent from a consumer that does not comply with the October 2013 order, it should obtain new consent. Businesses should also provide in each communication a method for consumers to opt out of receiving advertising messages. In addition, they should maintain and honor a do-not-call or unsubscribe list that includes any customer who requests in a reasonable manner to opt-out from receiving messages.

IV. Conclusion

Text message advertising is a practice that is only likely to continue to grow. As more and more businesses communicate with their consumers via text messages, more and more nuanced regulations concerning commercial text messaging may develop. The FCC takes seriously its ability to regulate under the TCPA and will likely continue to provide guidance. As it does so, a whole host of new issues may arise, making it likely that lawsuits under the TCPA will not subside anytime soon. Franchisors whose systems use text message advertising face the additional possibility of being named in a lawsuit as a party that is vicariously liable for the acts of its franchisees. For this reason, it is important for franchisors to be thoughtful in how they use text message advertising and they advise franchisees on the issue and to stay on top of the latest guidance and legal developments.