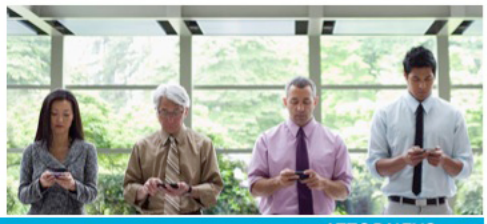
Why The Telephone Consumer Protection Act Is Relevant To Every Company

Chris Burnside
Frost Brown Todd (Louisville, KY)

cburnside@fbtlaw.com | 502.568.0245
http://www.frostbrowntodd.com/professionals-christopher_burnside.html

The TCPA: A Billion Dollar Problem



Chris Burnside
cburnside@fbtlaw.com

Views expressed in these materials are those of the author individually, and do not constitute legal or any other formal advice.

Brief History of TCPA

- 20 years old
- Privacy statute
- ATDS, artificial and pre-recorded calls
- FCC and State AGs enforce
- Special emphasis on:
  - Advertising and telemarketing
  - All cell phone communications
  - Consent to be called
  - Opt outs
  - Do not call list, etc.
  - Faxes

2013 FCC Changes

- Broad HIPAA Exemption
- All auto dialed pre-recorded or artificial calls (including SMS) to wireless phones for advertising or telemarketing now subject to “express written consent”
  [All wireless calls using ATDS or pre-recorded voice require prior express consent]
- Similar calls to residential phones are no longer exempt due to EBR AND require “express written consent.”
- Requires automated, interactive “opt-out”
- Changes measuring call abandonment rates
- Ban on calls to public safety phones (new “PSAP” do not call database)
- Still evolving – Small Entity Compliance Guide

(a) No person or entity may:

(1) Except as provided in paragraph (a)(2) of this section, initiate any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

***

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

***

(2) Initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, other than a call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

(3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call;

(i) Is made for emergency purposes;

(ii) Is not made for a commercial purpose;

(iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing;

(iv) Is made by or on behalf of a tax-exempt nonprofit organization; or

(v) Delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

Smart Phone Warning

USING an ATDS, artificial or pre-recorded voice is Risky

- May only do so for emergencies or
- If you have Prior Express Consent
- UNLESS, the text or call is an advertisement or marketing.

Special Warning

OPT Outs

- Every artificial or pre recorded telephone message that is advertising or telemarketing must have an opt out mechanism
- Faxes as well

(b) All artificial or prerecorded voice telephone messages shall:

***

(3) In every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii), provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two (2) seconds of providing the identification information required in paragraph (b)(1) of this section. When the called person elects to opt out using such mechanism, the mechanism, must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call. When the artificial or prerecorded voice telephone message is left on an answering machine or a voice mail service, such message must also provide a toll free number that enables the called person to call back at a later time an connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the seller's do-not-call list.

***

(4) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless--

***

(iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this paragraph only if--

(A) The notice is clear and conspicuous and on the first page of the advertisement;

(B) The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(4)(v) of this section is unlawful;

(C) The notice sets forth the requirements for an opt-out request under paragraph (a)(4)(v) of this section;

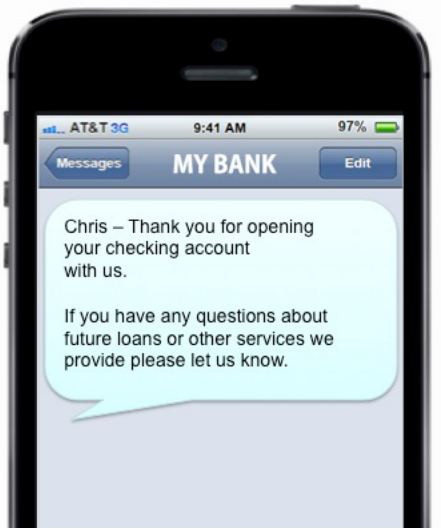
(D) The notice includes--

(1) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and

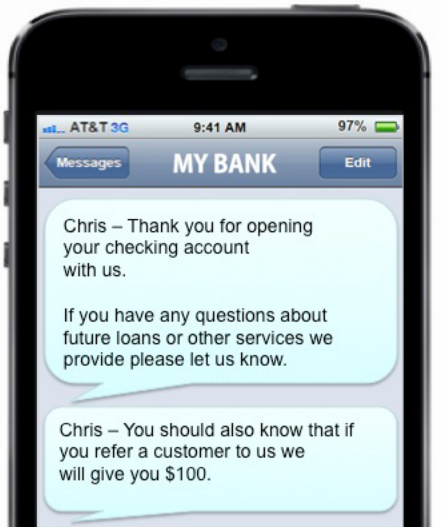
(2) If neither the required telephone number nor the facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or email address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and

The TCPA

The TCPA



The TCPA



The TCPA

TCPA Debt Collection and Banks

Bank of America:

- 32 Million Dollar settlement approved (Mortgage/Credit card debt)

Capital One:

- 75 Million Dollar settlement – pending approval

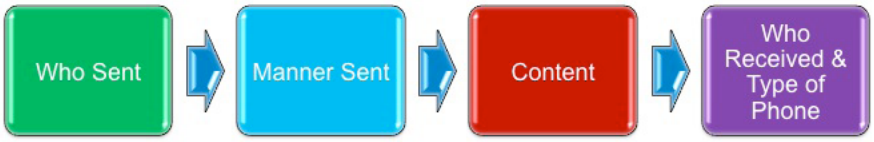
Prior express consent v. prior express written consent

The business challenge

- 99% of text messages are opened and 90% are read in 3 minutes or less.

- Key: Implement business strategies to develop permissible distribution lists and manage lists

Is There a TCPA Exposure?
(a simple analytical overview)



Does this text violate the TCPA?

Answer: Did customer provide their cell number?
Did your customer give you prior express consent?

Does this text violate the TCPA?

Answer: Is it advertising or telemarketing?

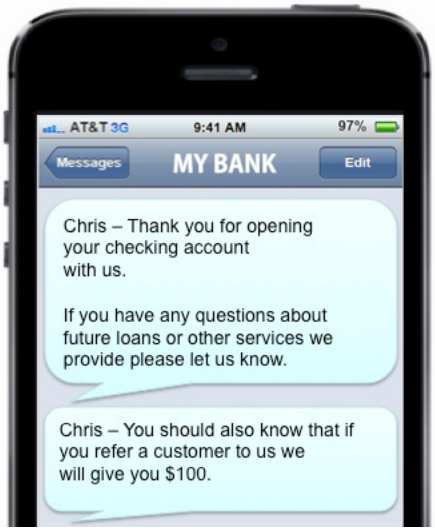
Is this an advertisement or telemarketing?

- Telemarketing – “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.”
- Advertisement – “any material advertising the commercial availability or quality of any property, goods or services.”

Chris – Thank you for opening your checking account with us.
If you have any questions about future loans or other services we provide please let us know.

Does this text violate the TCPA?

Answer: Did customer give you express written consent?



Was there proper consent?

- Prior express consent
- Prior express written consent

Chris – Thank you for opening your checking account with us.

If you have any questions about future loans or other services we provide please let us know.

Chris – You should also know that if you refer a customer to us we will give you $100.

47 C.F.R. § 64.1200

(8) The term prior express written consent means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

(ii) The term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

Does this text violate the TCPA?

Answer: Did customer provide cell number during transaction that created the debt?

Is this an exempt healthcare text?

- Has FCC exceeded its authority?
- Does HIPAA apply?
- Is this marketing?

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

***

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) [residential lines, not cell phones] of this subsection, subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines--

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United State--

***

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

Is this a health related communication?

5/5/12 Report:
"Finally we exempt from TCPA requirements prerecorded calls to residential lines made by healthcare-related entities governed by [HIPAA]"

47 C.F.R. § 64.1200

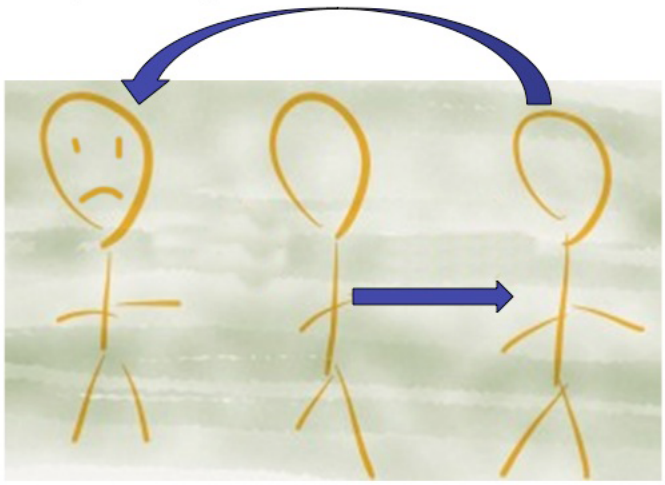
(2) Initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, other than a call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

Was the call made with ATDS??

- The use of "equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

Is a Smart Phone an ATDS?

3rd Party Liability

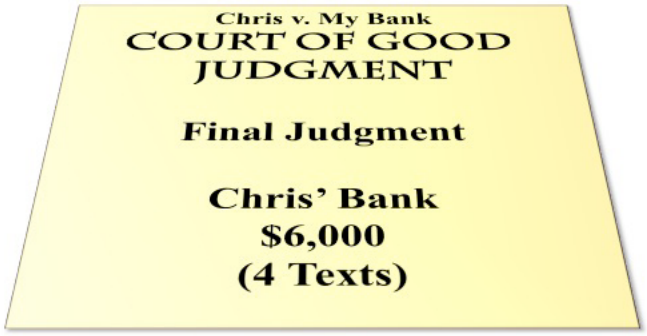


What about insurance coverage?

- Traditional policies
- Cyber insurance

Final Thoughts

- If you are sued, consider an **OFFER OF JUDGMENT**



Oui, Mais – "but of course" the 11th Circuit Holds Wife's Providing Cell Phone Number Was "Prior Express Consent" for Debt Collection Calls
by Christopher S. Burnside and William T. Repasky

In Mais v. Gulf Coast Collection, 2014 WL 4802457, the Court held that providing a cell number on a hospital admission form was "prior express consent" consistent with previous FCC rulings. To date, this is the most significant decision involving the binding application of the FCC's interpretation on rulings that merely providing a cell number is "prior express consent" to be called in certain situations.

The Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, has become the darling of opportunistic plaintiff class action counsel because of the near strict liability for violations of the act, and its statutory damages of $500 or up to $1500 per violation. Under the TCPA, before a business may text or call a customer on the customer's cell or smart phone, using an automatic telephone dialing system or artificial or pre-recorded message, the business must have the customer's "prior express consent." If any part of the communication contains a marketing message, the business must obtain the customer's "express written consent." In many instances, the TCPA requires the business to provide an opt-out mechanism as part of the artificial or pre-recorded message. Alleged violations of these rules, and others, have been the basis of many class action lawsuits involving debt collection, marketing and other calls to customers. In many instances, the cases will turn on whether the customer provided their "prior express consent" to be called or texted on their cell or smart phones.

Since at least 2008, the FCC has advised through its orders that a party gives "prior express consent" to be auto called on their cell phone when they provide their cell phone number to a creditor as part of the application process for extending credit and creating a debt. In re Rules and Regulations Implementing Telephone Consumer Protection Act 1991, Declaratory Ruling 23 FCC Rcd. 559 (Jan. 2008). Nevertheless, courts have struggled with the "prior express consent" requirement, and whether a customer who has provided a cell number has in fact provided "prior express consent."

Most Courts have followed the FCC's interpretation of "prior express consent." See, Van Patten v. Vertical Fitness Group, LLC, 2014 WL 2116602 (S.D. Cal. 2014) (providing cell number to one gym was consent to be called by renamed and rebranded gym 3 years after customer cancelled membership); Baird v. Sabre Inc., 995 F. Supp 1100 (C.D. Cal. 2014) (providing cell number to airline was consent to texts concerning flight related matters); Emanuel v. Los Angeles Lakers, Inc., 2013 WL 1719035, *6 (C.D. of Cal., April 18, 2013) (following several other decisions, the court concluded that providing cell number during transaction is prior express consent to receive confirmatory text message); Roberts v. Paypal, Inc., 2013 WL 2384242, *7 (N.D.Cal.) (defendant's summary judgment motion granted when court found that plaintiff consented to text messages by providing his cell phone number); Jamison v. First Credit Services, 2013 U.S. Dist. LEXIS 43978 *45 (N.D.Ill., 2013)(class certification denied, finding individualized consent issues predominated because evidence showed that a significant percentage of the putative class members consented to receiving cell phone calls by providing cell numbers to defendant); Saunders v. NCO Fin. Sys., 2012 WL 6644278, *3 (E.D.N.Y. 2012) (in a debt collection case under FDCPA and TCPA, plaintiff conceded that he had consented to the calls because the court noted, "authorities are almost unanimous that voluntarily furnishing a cell phone number to a vendor or other contractual counterparty constitutes express consent"); Pinkard v. Wal-Mart Stores, Inc., 2012 WL 5511039, *5- 6 (N.D. Ala. 2012) (voluntary provision of cell phone number is an invitation to be called); Ibey v. Taco Bell Corp., 2012 WL 2401972, *3 (S.D. Cal. 2012) (because plaintiff initially texted Defendant, a later text confirming that plaintiff no longer wanted to receive text messages did not violate TCPA); Ryabyschuck v. Citibank, 2012 WL 5379143, *3 (S.D. Cal. 2012) (providing cell number without caveat was some measure of prior consent); Greene v. DirecTV, Inc., 2010 WL 4628734, *3 (N.D. Ill., 2010) (plaintiff consented to fraud alert calls by releasing cell number as the chosen manner to be reached).

Other Courts however, have not followed the FCC's guidance for a variety of reasons. See, Edeh v. Midland Credit Management, Inc., 748 F.Supp.2d 1030, 1038 (D. Minn. 2010) (In an action brought under FDCPA and TCPA, the Court held that "express" means "explicit" and not "implicit" consent; debt collector was not permitted to make an automated call unless plaintiff "had previously said something like this: 'I give you permission to use an automatic telephone dialing system to call my cellular phone.'"); Leckler v. Cashcall, 554 F.Supp.2d 1025 (N.D. Cal. 2008), (court found that the FCC's guidance permitted "implied" consent which is "manifestly contrary to the plain language of the statute," unreasonable, and not entitled to deference),

vacated for lack of subject matter jurisdiction and dismissed, 2008 WL 5000528; Travel Travel Kirkwood, Inc. v. Jen N.Y., Inc., 206 S.W.3d 387, 392 (Mo. Ct. App. 2006) ("If consent is not manifested by explicit and direct words, but rather is gathered only by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties, it is not express consent. Rather, it is merely implied consent.").

Like many of these cases, the issues in Mais included whether providing a cell number to a creditor was express or implied consent to be called and, whether courts are required to follow FCC rule making authority on the issue, or whether they are free to reach a different conclusion. In Mais, Plaintiff sought treatment at a hospital emergency room in Florida. Plaintiff's wife completed and signed the admission documents. In those documents, she provided insurance information, and Plaintiff's cell phone number. She also acknowledged that receipt of the hospital's privacy policies, and expressly agreed that Plaintiff's healthcare information may be released for "purposes of treatment, payment or healthcare questions," including payment and benefit questions. Plaintiff was admitted to the hospital, and Florida United Radiology provided services to Plaintiff. Later, a billing dispute arose with Florida United and Gulf Coast, a third party debt collection service, began collection efforts. Gulf Coast called Plaintiff's cell phone with an auto dialer between 10 and 30 times, and made similar calls to other putative class members.

Based on these facts, the District Court held that Plaintiff had not provided "prior express consent" to receive debt collection calls to his cell phone. The District Court held that compliance with HIPAA did not automatically ensure compliance with the TCPA, and that the FCC's interpretation of "prior express consent" was not entitled to deference because it conflicts with the clear meaning of the TCPA. See Chevron, U.S. A., Inc. v. Natural Res. Def. Council, Inc., 467 US. 837, 843 n. 9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.") On the latter point, the District Court concluded that providing a cell number was at best "implied" consent, not the required "express" consent. Moreover, the District Court concluded that the FCC interpretation did not apply because Plaintiff did not provide the cell number to the bill collector. The District Court further held that the medical providers could not be held vicariously liable under the TCPA for Gulf Coast's collection calls.

The Eleventh Circuit Court of Appeals disagreed with the District Court's holdings on nearly every point. Most importantly, the Court held that the District Court exceeded its jurisdiction by holding that the 2008 FCC ruling was inconsistent with the TCPA. Under Section 402(a) of the Communications Act, any proceeding "to enjoin, set aside, annul, or suspend any order of the Commission" must be brought under the Hobbs Act. The Hobbs Act grants exclusive jurisdiction for these issues to the Federal Courts of Appeal. 28 U.S.C. § 2342; see also, FCC v. ITT World Comm'ns, Inc., 466 U.S. 463, 468 (1984) (Exclusive jurisdiction for review of final FCC orders lies in the Federal Court of Appeals). The Court also rejected Plaintiff's argument that he did not provide the cell phone number to Florida United or its collection agent Gulf Coast, and that the terms "health information" as used in the hospital admission forms did not include his cell phone number. In closing, the Court noted, "Ultimately, by granting the Hospital permission to pass his health information to Florida United for billing, Mais's wife provided his cell phone number to the creditor, consistent with the meaning of prior express consent announced by the FCC in its 2008 Ruling. Gulf Coast is entitled to summary judgment precisely because the calls to Mais fell within the TCPA prior express consent exception as interpreted by the FCC. Under the Hobbs Act, the district court lacked jurisdiction to review the Commission's interpretation."

The Eleventh Circuit decision in Mais v. Gulf Coast is good news, but cannot universally solve the issue of prior consent for many businesses due to jurisdictional issues and opportunistic plaintiffs' attorneys, as well as the factual nuance and complexity proving such consent. Two recent class action settlements highlight the problem: First, on September 2, 2014, a California Federal District Court approved the settlement of six pending TCPA class action suits against Bank of America. The settlement involved 7 million class members. The settlement amount was 32 million dollars, and was based on an allegation that Bank of America had a systematic practice of using an automatic telephone dialing system to call customer cell phones to collect residential and credit card debts, without prior express consent. Similarly, Capital One recently agreed to pay 75 million dollars to settle several class actions where plaintiff's alleged that Capital One used an auto dialer to call customer cell phones without any consent. These bank settlements demonstrate that the decision in Mais will not put an end to these cases, and that the economics of proving that an enormous number of calls were made only after

the customer gave prior express consent by providing their cell number (or otherwise) can lead to rational business decisions to settle rather than litigate to victory. Given the exposure, some businesses might elect to make all calls to residential lines, or to obtain actual written consent to call or text cell phones. In the end, the only way to eliminate litigation of prior express consent cases for calls to cell phones is for Congress to pass legislation recognizing that cell phones are the most common form of communication in today's market place, and that this is the consuming public's preference. After all, the TCPA was first enacted over 20 years ago. Today, the notion that a business call to a cell phone significantly increases the cost to a consumer seems outdated.

Finally, many may choose to litigate the scope of the Court's holding in Mais. Is the holding limited to medical bill collection efforts where HIPAA applies? Will other courts disagree with the Mais Court's conclusion that a lower court lacks jurisdiction to address the FCC 2008 ruling on prior express consent? And, what if the cell number is provided by someone other than the recipient of the call at issue or as part of a separate or different transaction? See, Osorio v. State Farm Bank, 746 F.3d 1242 (11th Cir. 2014) (Under TCPA, auto dialed and pre-recorded debt collection calls may only be placed to the subscriber of the cell phone being called because live in girlfriend did not have authority to consent to credit card collection calls to boyfriend's cell phone.)

2014 WL 4802457
Only the Westlaw citation is currently available.
United States Court of Appeals,
Eleventh Circuit.

Mark S. MAIS, on behalf of himself and all others similarly situated, Plaintiff–Appellee,
v.
GULF COAST COLLECTION BUREAU, INC., Defendant–Appellant.

No. 13–14008. | Sept. 29, 2014.

Attorneys and Law Firms

Deepak Gupta, Jonathan Ellis Taylor, Gupta Beck PLLC, Washington, DC, O. Randolph Bragg, Chicago, IL, Donald A. Yarbrough, Donald A. Yarbrough, Esq., Fort Lauderdale, FL, for Plaintiff–Appellee.

Ernest H. Kohlmyer, III, Urban Thier Federer & Chinner, PA, Orlando, FL, for Defendant–Appellant.

Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 0:11–cv–61936–RNS.

Before HULL, MARCUS and HILL, Circuit Judges.

Opinion

MARCUS, Circuit Judge:

***1** Plaintiff Mark Mais filed a claim in federal district court against a hospital-based radiology provider and its debt collection agent for making autodialed or prerecorded calls in violation of the Telephone Consumer Protection Act of 1991 (TCPA), Pub.L. No. 102–243, 105 Stat. 2394 (codified at 47 U.S.C. § 227). Defendant Gulf Coast Collection Bureau, Inc. ("Gulf Coast") argued that the calls fell within a statutory exception for "prior express consent," as interpreted in a 2008 declaratory ruling from the Federal Communications Commission (the "FCC" or "Commission"). *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (2008 FCC Ruling), 23 FCC Rcd. 559, 564. The district court granted Mais partial summary judgment against Gulf Coast for alternative reasons: the FCC's interpretation was inconsistent with the language of the TCPA and, regardless, the 2008 FCC Ruling did not apply on the facts of this case.

As we see it, the district court lacked the power to consider in any way the validity of the 2008 FCC Ruling and also erred in concluding that the FCC's interpretation did not control the disposition of the case. In the Hobbs Act, 28 U.S.C. § 2342, Congress unambiguously deprived the federal district courts of jurisdiction to invalidate FCC orders by giving exclusive power of review to the courts of appeals. *See Self v. Bellsouth Mobility, Inc.*, 700 F.3d 453, 461 (11th Cir.2012). And Mais's claim falls squarely within the scope of the FCC order, which covers medical debts. The 2008 FCC Ruling "conclude[d] that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent to be contacted at that number regarding the debt." 23 FCC Rcd. at 564. There is no dispute that Mais's wife listed his cell phone number on a hospital admissions form and agreed to the hospital's privacy practices, which allowed the hospital to release his health information for billing to the creditor. As a result, the TCPA exception for prior express consent—as interpreted in the 2008 FCC Ruling—entitles Gulf Coast to judgment as a matter of law. Accordingly, we reverse the district court's grant of partial summary judgment to Mais and remand with instructions to enter final summary judgment for Gulf Coast.

I.

A.

The district court found the following facts to be material and undisputed, and indeed the parties have not disputed any of them on appeal. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 944 F.Supp.2d 1226, 1230–31 & n. 1 (S.D.Fla.2013). Mark Mais sought emergency room treatment at the Westside Regional Hospital (the "Hospital") in Broward County, Florida, in 2009. On behalf of her ill husband, Laura Mais completed and signed admissions documents, which she gave to a Hospital representative. She provided the admitting nurse with demographic and insurance information, including her husband's cell phone number. By signing a Conditions of Admission form, she acknowledged receiving the Hospital's Notice of Privacy Practices (the "Notice") and expressly agreed that "the hospital and the physicians or other health professionals involved in the inpatient or outpatient care [may] release [Plaintiff's] healthcare information for purposes of treatment, payment or healthcare operations," including "to any person or entity liable for payment on the patient's behalf in order to verify coverage or payment questions, or for any other purpose related to benefit payment." *Id.*

at 1230–31 (alterations in original). Moreover, the Notice said the Hospital "may use and disclose health information about [Plaintiff's] treatment and services to bill and collect payment from [Plaintiff], [his] insurance company or a third party payor." *Id.* at 1231 (alterations in original). The Notice stated that "[w]e may also use and disclose health information ... to business associates we have contracted with to perform agreed upon service and billing for it," including "physician services in the emergency department and radiology." In addition, the Notice told patients that the Hospital "may disclose your health information to our business associate[s] so that they can perform the job we've asked them to do and bill you." Finally, the Conditions of Admission form stated that services provided by "[h]ospital-based physicians," including "Radiologists," "are rendered by independent contractors" and "will be billed for separately by each physician's billing company."

***2** Mark Mais was admitted to the Hospital, where he received radiology services from Florida United Radiology, L.C. ("Florida United"), a hospital-based provider. Mais incurred a medical debt of $49.03 to Florida United. McKesson Practice Services ("McKesson"), a billing company serving as Florida United's agent, electronically retrieved Mais's telephone number and demographic information from the Hospital and billed Mais. When Mais did not pay or dispute the debt, McKesson forwarded his account to Gulf Coast for collection pursuant to a written agreement between Gulf Coast and Florida United's parent company, Sheridan Acquisition, P.A. ("Sheridan"), that provided Gulf Coast would "perform third party collection services on referred accounts receivable." Gulf Coast is a debt collector that uses a predictive dialer to dial telephone numbers through automated technology. *See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14,014, 14,022 (2003) ("Predictive dialers, which initiate phone calls while telemarketers are talking to other consumers, frequently abandon calls before a telemarketer is free to take the next call. Using predictive dialers allows telemarketers to devote more time to selling products and services rather than dialing phone numbers, but the practice inconveniences and aggravates consumers who are hung up on." (footnote omitted)); id. at 14,093 ("[T]he Commission finds that a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress."). Gulf Coast called Mais's cell phone about the debt with its predictive dialer between fifteen and thirty times and left four messages. Gulf Coast similarly placed calls to other putative class members to collect medical debts owed to Florida United.

Mais filed an amended class action complaint against Gulf Coast, Florida United, and Sheridan (collectively, "Defendants") in the United States District Court for the Southern District of Florida, alleging that their collection activities violated the Telephone Consumer Protection Act because Gulf Coast, acting on behalf of Florida United and Sheridan, called Mais's cell phone using an automatic telephone dialing system or a prerecorded or artificial voice without his prior express consent. [1] Before the district court considered the question of class certification, the Defendants moved for summary judgment on the affirmative defense that the calls could not and did not violate the TCPA because Mais provided "prior express consent" to receive them when his wife completed in writing the Hospital admissions forms. *See* 47 U.S.C. § 227(b)(1)(A)(iii). The Defendants relied on a 2008 FCC Ruling, which concluded that "the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt." 23 FCC Rcd. at 564. Defendants further argued that, because the Hospital had consent to use and disclose Mais's cell phone number under the Health Insurance Portability and Accountability Act (HIPAA), Pub.L. No. 104–191, 110 Stat.1936 (1996), the TCPA prior express consent exception was satisfied. Florida United and Sheridan also separately argued that they could not be held vicariously liable for Gulf Coast's calls because § 227(b)(1)(A) of the TCPA only reaches those who "make any call" to a cell phone using automatic dialing or a recorded voice. Mais likewise moved for partial summary judgment, arguing that he had not given prior express consent for the calls because the 2008 FCC Ruling did not apply to medical debt and because his cell phone number had been given to the Hospital, not the creditor, Florida United.

***3** The district court found that Mais, not the Defendants, was entitled to summary judgment on the prior express consent defense mounted by Gulf Coast, Florida United, and Sheridan. The court began by explaining that satisfaction of HIPAA did not automatically ensure compliance with the TCPA, "a separate statute that imposes separate requirements." *Mais*, 944 F.Supp.2d at 1234. The district court also determined that Defendants could not prevail on the basis of the 2008 FCC Ruling. While acknowledging that the Hobbs Act gave the federal courts of appeals exclusive jurisdiction to review final FCC orders, the district court

determined that it had jurisdiction to examine the FCC's interpretation of the TCPA because the central purpose of Mais's suit was to obtain damages for violations of the statute, not to collaterally attack or invalidate the 2008 FCC Ruling. The court concluded that the Federal Communication Commission's interpretation of "prior express consent" embodied in its 2008 rule was not entitled to any deference because it conflicted with the clear meaning of the TCPA. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). According to the district court, implying consent from the provision of a cell phone number to a creditor impermissibly expanded the statutory exception to cover "prior express *or implied* consent." *Mais*, 944 F.Supp.2d at 1239. *Compare* Black's Law Dictionary 346 (9th ed.2004) (defining "express consent" as "[c]onsent that is clearly and unmistakably stated"), *with id.* (defining "implied consent" as "[c]onsent inferred from one's conduct rather than from one's direct expression"). Cut loose from any FCC rulemaking concerning the meaning of prior express consent, and thus interpreting the language found in the Act afresh, the district court concluded that listing Mais's cell phone number on the Hospital admissions documents alone did not evince prior express consent to receive autodialed or prerecorded calls. In the alternative, the district court also ruled that, even if the FCC's interpretation of the meaning of prior express consent found in the 2008 FCC Ruling was valid and binding, the rule would not apply under the facts of this case because it was designed to cover consumer and commercial contexts and did not reach medical settings. Moreover, the district court determined, the FCC's 2008 rulemaking would not apply here because Mais's wife gave his number only to the Hospital and not to the creditor, Florida United.

At the same time, the district court ruled that defendants Sheridan and Florida United were entitled to summary judgment anyway because they could not be held vicariously liable under the Telephone Consumer Protection Act for Gulf Coast's calls. Ultimately, the district court granted summary judgment to Mais against Gulf Coast in part, ruling that he was entitled to $500 per call in statutory damages for each of fifteen violative calls placed to his cell phone, as well as an injunction ordering Gulf Coast not to place any further calls to Mais's cell phone in violation of the TCPA. The court left for trial the singular issue of whether Gulf Coast willfully or knowingly violated the TCPA, and thus whether Mais would be entitled to up to treble damages.

***4** After unsuccessfully seeking reconsideration of the summary judgment order, Gulf Coast asked the district court to certify the prior express consent issue for interlocutory appeal because the "order involve[d] a controlling question of law as to which there is substantial ground for difference of opinion" and because "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). [2] The district court certified four questions to this Court:

> 1) Whether a district court has jurisdiction under the Hobbs Act to review an FCC order in a TCPA case when the plaintiff does not challenge the validity of that order;
>
> 2) If the district court has such jurisdiction, whether the FCC's pronouncements on the issues of "prior express consent" and vicarious liability are entitled to deference under *Chevron;*
>
> 3) If the district court lacks such jurisdiction, whether the FCC's opinion on "prior express consent" is limited to the consumer credit transaction arena such that it does not apply to the medical care setting; and
>
> 4) Whether a medical provider's consent to use and disclose patient information, including phone numbers, under HIPAA equates to "prior express consent" for affiliates and agents of that provider to call the patient on his cell phone for debt collection purposes using an automated telephone dialing system.

This Court granted Gulf Coast's timely petition for permission to appeal under § 1292(b).

Though the certified questions may guide our analysis, "[t]he scope of review on appeal under 28 U.S.C. § 1292(b) 'is not limited to the precise question certified by the district court because the district court's order, not the certified question, is brought before the court." ' *Moorman v. UnumProvident Corp.*, 464 F.3d 1260, 1272 (11th Cir.2006) (quoting *Aldridge v. Lily–Tulip, Inc. Salary Ret. Plan Benefits Comm.*, 40 F.3d 1202, 1207 (11th Cir.1994)); *accord Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) ("[T]he appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.' " (quoting 9 James W. Moore & Bernard J. Ward, *Moore's Federal Practice* ¶ 110.25[1], at 300 (2d ed.1995))).

B.

A review of the statutory and regulatory background is critical to understanding the proper resolution of the issues raised by this appeal. In response to evidence "that automated or prerecorded calls are a nuisance and an invasion of privacy," Congress passed the Telephone Consumer Protection Act to balance "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade." TCPA § 2(9), (13), 105 Stat. at 2394, 2395. The TCPA prohibits "any person ... to make any call (other than a call made for emergency purposes or made with the *prior express consent* of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone number assigned to a ... cellular telephone service." 47 U.S.C. § 227(b)(1) (emphasis added). The TCPA also creates a private right of action that allows a person to seek an injunction or monetary damages based on a violation of § 227(b) or a regulation promulgated thereunder. *Id.* § 227(b)(3). For each violation, a plaintiff can recover the greater of actual monetary loss or $500. *Id.* § 227(b)(3)(B). Up to treble damages are available if the defendant committed a violation willfully or knowingly. *Id.* § 227(b)(3)(C).

***5** Moreover, Congress has conferred upon the FCC general authority to make rules and regulations necessary to carry out the provisions of the TCPA. *Id.* § 227(b)(2) ("The Commission shall prescribe regulations to implement the requirements of this subsection."); *see id.* § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."); *id.* § 303 ("Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall —... (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter...."). The TCPA emphasizes that "the [FCC] should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy." Pub.L. No. 102–243, § 2(13), 105 Stat. at 2395. As a result, the TCPA permits the FCC to create exemptions "by rule or order" for certain automatically dialed or prerecorded calls, such as calls not made for a commercial purpose, 47 U.S.C. § 227(b)(2)(B)(i), calls that will not adversely affect privacy rights and do not involve unsolicited advertisement, *id.* § 227(b)(2)(B)(ii), and calls made to cell phones that are not charged to the called party, *id.* § 227(b)(2)(C).

The first FCC rules implementing the Act came in a 1992 Report and Order that concluded "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (1992 FCC Order), 7 FCC Rcd. 8752, 8769. Therefore, the FCC explained, "telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached." *Id.* In reaching that conclusion, the FCC specifically referenced the House Report on the TCPA, which recognized that, if a person knowingly releases his phone number, calls are permitted because "the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications." *Id.* at 8769 n. 57 (quoting H.R.Rep. No. 102–317, at 13 (1991)).

In 2008, in response to a Petition for Expedited Clarification and Declaratory Ruling filed by ACA International, a trade organization of credit and collection companies,[3] the FCC after notice and comment issued a Declaratory Ruling "clarify[ing] that autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the 'prior express consent' of the called party." 2008 FCC Ruling, 23 FCC Rcd. at 559. Specifically, the FCC "conclude[d] that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt." *Id.* at 564. The FCC "emphasize[d] that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed." *Id.* at 564–65. The Commission concluded that "the burden will be on the creditor to show it obtained the necessary prior express consent" because "creditors are in the best position to have records kept in the usual course of business showing such consent." *Id.* at 565. As in the 1992 FCC Order, the Commission found support for its interpretation of prior express consent from the legislative history of the TCPA, including the House Report, which stated that "[t]he restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller for

use in normal business communications." *Id.* at 564 (quoting H.R.Rep. No. 102–317, at 17).

***6** In 2012, the FCC issued still another Report and Order that further interpreted the meaning of the prior express consent exception embodied in § 227(b)(1)(A) of the statute, though the Commission did not change the standard for debt collection calls made to cell phone numbers. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (2012 FCC Order), 27 FCC Rcd. 1830. The 2012 FCC Order required written prior express consent for autodialed or prerecorded calls to wireless or residential numbers that deliver a telemarketing message. *Id.* at 1838. It "eliminate[d] the established business relationship exemption for prerecorded telemarketing calls to residential lines" created by the FCC in 1992. *Id.* at 1845. And the Commission added an exemption for "all prerecorded health care-related calls to residential lines that are subject to HIPAA." *Id.* at 1852.

II.

We review the grant or denial of a motion for summary judgment *de novo*. *See Moton v. Cowart*, 631 F.3d 1337, 1341 (11th Cir.2011). In so doing, we draw all inferences and review all evidence in the light most favorable to the non-moving party. *Id.* Summary judgment is required when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a).

A.

The district court exceeded its jurisdiction by declaring the 2008 FCC Ruling to be inconsistent with the TCPA. Section 402(a) of the Communications Act provides that (except in limited circumstances not relevant here) any "proceeding to enjoin, set aside, annul, or suspend any order of the Commission" must be brought under the Hobbs Act. 47 U.S.C. § 402(a). The Hobbs Act, in turn, expressly confers on the federal courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" such FCC orders. 28 U.S.C. § 2342; *see FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984) ("Exclusive jurisdiction for review of final FCC orders ... lies in the Court of Appeals."). This procedural path created by the command of Congress "promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of agency review, and allows 'uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress' to enforce the TCPA." *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir.2010) (quoting *United States v. Dunifer*, 219 F.3d 1004, 1008 (9th Cir.2000)); *see Nack v. Walburg*, 715 F.3d 680, 685 (8th Cir.2013), *cert. denied*, 134 S.Ct. 1539 (2014). In explaining the reach of the Hobbs Act, the Supreme Court has instructed that, "[a]bsent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 745 (1985).

***7** Despite these statutory strictures, the district court asserted jurisdiction to review the 2008 FCC Ruling because Mais did not sue with the primary intent "to enjoin, set aside, annul, or suspend" an FCC order, 47 U.S.C. § 402(a), and because Mais's claim did not necessarily depend on invalidation of the agency's ruling. The district court reasoned that the FCC's interpretation of the meaning of the term "prior express consent" could not be reconciled with the statutory language, and therefore it discarded the administrative agency's rulemaking determination. In doing so, the district court exceeded its jurisdiction. "Because the courts of appeals have exclusive jurisdiction over claims to enjoin, suspend, or invalidate a final order of the FCC, the district courts do not have it." *Self*, 700 F.3d at 461. "That means district courts cannot determine the validity of FCC orders." *Id.* By refusing to enforce the FCC's interpretation, the district court exceeded its power. "[D]eeming agency action invalid or ineffective is precisely the sort of review that the Hobbs Act delegates to the courts of appeals in cases challenging final FCC orders." *CE Design*, 606 F.3d at 448.

Moreover, Hobbs Act jurisdictional analysis looks to the "practical effect" of a proceeding, not the plaintiff's central purpose for bringing suit. *B.F. Goodrich Co. v. Nw. Indus., Inc.*, 424 F.2d 1349, 1353–54 (3d Cir.1970) ("The statutory procedure for review is applicable although an order is not directly attacked—so long as the practical effect of a successful suit would contradict or countermand a Commission order."). The district courts lack jurisdiction to consider claims to the extent they depend on establishing that all or part of an FCC order subject to the Hobbs Act is "wrong as a matter of law" or is "otherwise invalid." *Self*, 700 F.3d at 462. The Hobbs Act does not ask whether an FCC order was

first invoked as part of a plaintiff's claim or as an affirmative defense. *See Nack,* 715 F.3d at 686 (" '[W]here the practical effect of a successful attack on the enforcement of an order involves a determination of its validity,' such as a defense that a private enforcement action is based upon an invalid agency order, 'the statutory procedure for review provided by Congress remains applicable." ' (quoting *Sw. Bell Tel. v. Ark. Pub. Serv. Comm'n,* 738 F.2d 901, 906 (8th Cir.1984))).

In other words, "[w]hichever way it is done, to ask the district court to decide whether the regulations are valid violates the statutory requirements." *United States v. Any and All Radio Station Transmission Equip.,* 207 F.3d 458, 463 (8th Cir.2000). "The exclusive jurisdiction of the courts of appeals cannot be evaded simply by labeling the proceeding as one other than a proceeding for judicial review." *Id.* (quoting *Sw. Bell Tel.,* 738 F.2d at 906). And "[a] defensive attack on the FCC regulations is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike." *Id.; see ITT World Commc'ns,* 466 U.S. at 468 ("Litigants may not evade [the Hobbs Act] by requesting the District Court to enjoin action that is the outcome of the agency's order."). Put still another way, whether the challenge to an FCC order "arises in a dispute between private parties makes no difference—the Hobbs Act's jurisdictional limitations are 'equally applicable whether [a party] wants to challenge the rule directly ... or indirectly, by suing someone who can be expected to set up the rule as a defense in the suit." ' *CE Design,* 606 F.3d at 448 (alterations in original) (quoting *City of Peoria v. Gen. Elec. Cablevision Corp.,* 690 F.2d 116, 120 (7th Cir.1982)). In the face of ample federal appellate precedent undermining his argument, Mais has pointed us to no decision from any other court concluding that a district court had jurisdiction to invalidate an order like the 2008 FCC Ruling in a dispute between private litigants. [4]

***8** Regardless of which party invoked the 2008 FCC Ruling, then, the district court lacked jurisdiction "to enjoin, set aside, annul, or suspend" it—precisely what the court did. 47 U.S.C. § 402(a). "To hold otherwise" and permit a challenge to the 2008 FCC Ruling "merely because the issue has arisen in private litigation would permit an end-run around the administrative review mandated by the Hobbs Act." *Nack,* 715 F.3d at 686. Mais is free to ask the Commission to reconsider its interpretation of "prior express consent" and to challenge the FCC's response in the court of appeals. *See Self,* 700 F.3d at 462 (citing 28 U.S.C. § 2344). But he "may not seek collateral review ... by filing claims in the district court." *Id.*

Moreover, we see no merit to Mais's argument that the 2008 FCC Ruling was not an order within the meaning of the Hobbs Act. Orders "adopted by the Commission in the avowed exercise of its rule-making power" that "affect or determine rights generally ... have the force of law and are orders reviewable under the" Hobbs Act. *Columbia Broad. Sys. v. United States,* 316 U.S. 407, 417 (1942); *see id.* at 416 ("The particular label placed upon [an order] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."). The 2008 FCC Ruling is a Hobbs Act final order. ACA International filed a petition seeking a declaratory ruling clarifying the TCPA's prior express consent exception. *See* 47 C.F.R. § 1.2(a) ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."). The FCC sought public comment in accordance with its rulemaking procedures. *Consumer & Governmental Affairs Bureau Seeks Comment on ACA International's Petition,* 21 FCC Rcd. 3600 (2006); *see* 47 C.F.R. § 1.415(a) ("After notice of proposed rulemaking is issued, the Commission will afford interested persons an opportunity to participate in the rulemaking proceeding through submission of written data, views, or arguments...."). Creditors and collectors filed comments in support of the petition, while consumer groups and individual consumers submitted comments in opposition. 2008 FCC Ruling, 23 FCC Rcd. at 563–64. Thereafter, the FCC issued its Declaratory Ruling pursuant to its general rulemaking authority to carry out the TCPA. *See id.* at 567 (citing 47 U.S.C. §§ 227, 303(r)). The 2008 FCC Ruling thus has the force of law and is an order reviewable under the Hobbs Act in the courts of appeals. *See Leyse v. Clear Channel Broad., Inc.,* 545 F. App'x 444, 455 (6th Cir.2013) (unpublished) ("[T]here is little question that Congress intended FCC rules of the type at issue here to have force of law."). In short, we hold that the district court was without jurisdiction to consider the wisdom and efficacy of the 2008 FCC Ruling. [5]

B.

***9** Although the district court lacked the power to review the validity of the FCC's interpretation of prior express consent, we are obliged to address the alternate holding of the court, that is, whether the facts and circumstances of this case somehow fall outside the scope of the 2008 FCC Ruling. *See*

Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 1257 (11th Cir.2014) ("[W]e are not called upon here to assess the order's validity. We are instead simply deciding whether the FCC's ... ruling is applicable to the present case."); *Self*, 700 F.3d at 463 (determining "the scope" of an FCC order).

The district court found that the 2008 FCC Ruling did not apply to the medical debt in this case because the Commission had addressed consent only in the context of consumer credit. But the FCC did not distinguish or exclude medical creditors from its 2008 Ruling. Quite the opposite, the FCC's general language sends a strong message that it meant to reach a wide range of creditors and collectors, including those pursuing medical debts. The 2008 FCC Ruling clarified the meaning of "prior express consent" for all "creditors and collectors when calling wireless telephone numbers to recover payments for goods and services received by consumers." 23 FCC Rcd. at 563. Moreover, the FCC noted that the debt collection calls at the heart of the 2008 Ruling are primarily regulated under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692–1692p, which includes medical bills within its broad definition of "debt": "any obligation ... of a consumer to pay money arising out of a transaction ... primarily for personal, family, or household purposes." 15 U.S.C. § 1692a. Indeed, we have recognized that the collection of medical debt can give rise to an FDCPA violation. *See, e.g.*, *Bradley v. Franklin Collection Serv., Inc.*, 739 F.3d 606, 607 (11th Cir.2014) (per curiam).

While the 2008 FCC Ruling listed the completion of "a credit application" as an example of the provision of a cell phone number to a creditor, the Commission did so illustratively, not exclusively. 23 FCC Rcd. at 564. Similarly, the fact that the FCC's interpretation often is invoked in the context of consumer or commercial creditors does not lessen its application to medical debt collection. *See Mitchem v. Ill. Collection Serv., Inc.*, No. 09 C 7274, 2012 WL 170968, at *1–2 (N.D.Ill. Jan. 20, 2012) (unpublished); *Moise v. Credit Control Servs., Inc.*, 950 F.Supp.2d 1251, 1253 (S.D.Fla.2011) ("Based on the plain language of the TCPA and the [2008] FCC order, it is clear that if Plaintiff gave his cell phone number directly to [a medical laboratory], that would constitute express consent."); *Pollock v. Bay Area Credit Serv., LLC*, No. 08–61101–CIV, 2009 WL 2475167, at *1 (S.D.Fla. Aug. 13, 2009) (unpublished) (applying the 2008 FCC Ruling to calls made by a defendant "attempting to collect a debt ... that arose from personal medical care").

***10** When it comes to expectations for receiving calls, we see no evidence that the FCC drew a meaningful distinction between retail purchasers who complete credit applications and medical patients who fill out admissions forms like the Hospital's. A patient filling out a form from a healthcare provider may very well expect to be contacted about his health and treatment. But if the form explicitly states that the provided information will be used for payment and billing, the patient has the same reason to expect collection calls as a retail consumer. Though Mais might prefer a different rule, the FCC in no way indicated that its 2008 order distinguishes medical debtors. Florida United, which sought payment for medical services performed for Mais, qualifies as creditor under the 2008 FCC Ruling.

Mais also suggests that the 2008 FCC Ruling does not affect his claim because he did not "provide" his number to "the creditor"—neither he nor his wife personally transferred his cell phone number to Florida United or its collection agent, Gulf Coast. After all, his wife submitted the admissions forms and the cell phone number to a representative of the Hospital, an entity separate from Florida United and Gulf Coast, and the 2008 FCC Ruling "emphasize [d] that prior express consent is deemed to be granted only if the wireless number was provided by the consumer *to the creditor*, and that such number was provided during the transaction that resulted in the debt owed." 23 FCC Rcd. at 564–65 (emphasis added). Boiled down, Mois's argument turns on whether, under the FCC's interpretation of prior express consent, a called party "provides" his cell phone number to a creditor when (during the transaction creating the debt) he authorizes an intermediary to disclose his number to the creditor for debt collection.

The 2008 FCC Ruling does not offer an explicit answer to this question because it does not spell out in detail the meaning of "provide." Based on the regulatory and statutory context, however, we reject Mais's argument that the 2008 FCC Ruling only applies when a cell phone number is given *directly* to the creditor. Mais's narrow reading of the 2008 FCC Ruling would find prior express consent when a debtor personally delivered a form with his cell phone number to a creditor in connection with a debt, but not when the debtor filled out a nearly identical form that authorized another party to give the number to the creditor. Mais offers no functional distinction between these two scenarios, and we see no sign that the FCC thought a cell phone number could be "provided to the creditor" only through direct delivery. To the contrary, the 2008 FCC Ruling indicated that prior express consent existed

when a cell phone subscriber "made the number available to the creditor regarding the debt." 23 FCC Rcd. at 567. Plainly, Mais's wife made his number available to Florida United by granting the Hospital permission to disclose it in connection with billing and payment.

***11** In addition, the FCC recently ruled "that the TCPA does not prohibit a caller from obtaining consent through an intermediary." *In re GroupMe, Inc./ Skype Commc'ns S.A.R.L. Petition*, 29 FCC Rcd. 3442, 3447 (2014). A provider of text messaging services asked the Commission to "clarify that for non-telemarketing voice calls or text messages to wireless numbers ... the caller can rely on a representation from an intermediary that they have obtained the requisite consent from the consumer." *Id.* at 3444. The FCC after notice and comment issued a Declaratory Ruling that found "the TCPA is ambiguous as to how a consumer's consent to receive an autodialed or prerecorded non-emergency call should be obtained." *Id.* Exercising its interpretive discretion, the FCC explained that "allowing consent to be obtained and conveyed via intermediaries in this context facilitates these normal, expected, and desired business communications in a manner that preserves the intended protections of the TCPA." *Id.* at 3445. Of particular note here, the FCC said that, though the 2008 FCC Ruling "did not formally address the legal question of whether consent can be obtained and conveyed via an intermediary," the earlier order "did make clear that consent to be called at a number in conjunction with a transaction extends to a wide range of calls 'regarding' that transaction, even in at least some cases where the calls were made by a third party." *Id.* at 3446. The FCC's recognition of "consent obtained and conveyed by an intermediary," *id.*, strongly supports our conclusion that Mais's wife "provided" the cell phone number to the creditor through the Hospital.

Other FCC explications of the prior express consent exception also show that the appropriate analysis turns on whether the called party granted permission or authorization, not on whether the creditor received the number directly. *See 2012 FCC Order*, 27 FCC Rcd. at 1839 ("[R]equiring prior written consent will better protect consumer privacy because such consent requires conspicuous action by the consumer —providing permission in writing—to authorize autodialed or prerecorded telemarketing calls...."); *1992 FCC Order*, 7 FCC Rcd. at 8769 ("[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."). This conclusion is consistent with the legislative history: the House and Senate Reports explain that the TCPA imposes liability for calls made without the called party's "prior express invitation or permission." H.R.Rep. No. 102–317, at 2, 3, 13; S.Rep. No. 102–177, at 16 (1991). Thus, under the 2008 FCC Ruling a cell phone subscriber like Mais could provide his number to a creditor like Florida United—and grant prior express consent to receive autodialed or prerecorded calls—by affirmatively giving an intermediary like the Hospital permission to transfer the number to Florida United for use in billing.

***12** Mais, through his wife, gave the hospital just such permission. On his behalf, Mais's wife gave his cell phone number to a Hospital representative. She received the Hospital's Notice of Privacy Practices, which informed her that "[w]e may use and disclose health information about your treatment and services to bill and collect payment from you, your insurance company, or a third party payer," and that "[w]e may also use and disclose health information ... [t]o business associates we have contracted with to perform the agreed upon service and billing for it." The Notice explained that, when services are contracted with business associates, including "physician services in the emergency department and radiology," the Hospital "may disclose your health information to our business associate so that they can perform the job we've asked them to do and bill you." Mais's wife signed a Conditions of Admission form in which she acknowledged receiving the Notice of Privacy Practices and "permit[ted] the hospital and the physicians or other health professionals involved in the inpatient or outpatient care to release the healthcare information for purposes of treatment, payment or healthcare operations." We have little doubt that by signing the admissions forms Mais's wife agreed to allow the Hospital to transmit his health information to Florida United so it could bill him for services rendered. [6]

Mais points out that the FCC concluded in its 2008 Ruling that "prior express consent provided to a particular creditor will not entitle that creditor (or third party collector) to call a consumer's wireless number on behalf of other creditors, including on behalf of affiliated entities." 23 FCC Rcd. at 565 n. 38. Here, however, the Hospital did not call Mais on behalf of Florida United. Nor did the Hospital give Mais's number to a debt collector to make unauthorized calls on behalf of other creditors. Instead, with explicit permission from Mais's wife, the Hospital passed his cell phone number to Florida United, the creditor who provided radiology services to Mais during his hospitalization. Because Mais's wife specifically authorized that transfer of health information for billing purposes, "the wireless number was provided by the

consumer to the creditor" in satisfaction of the prior express consent exception. *Id.* at 564.

Mais finally argues that the term "health information" as used in the Hospital admissions forms does not include his cell phone number. We disagree. The Notice of Privacy Practices refers to "health information" as the contents of the record created by a health care provider, which includes a patient's "symptoms, examination and test results, diagnoses, treatment, a plan for future care or treatment and billing-related information." The cell phone number listed by Mais's wife on the Hospital admission form was part of the record from his visit and was contact information related to billing. Mais observes that, at one point, the Notice explains that the Hospital "may use and disclose health information *about your treatment and services* to bill and collect payment." (emphasis added). This additional language does not exclude cell phone numbers; after all, contact information can be quite relevant to treatment and services. Other provisions describe the hospital's policy of disclosing health information for billing and payment without the "treatment and services" qualifier. And the Notice elsewhere makes clear that "health information" covers contact information like cell phone numbers because it tells patients that the Hospital may "use and disclose health information ... [t]o remind you that you have an appointment for medical care; [t]o assess your satisfaction with our services; ... [and][t]o contact you as part of fundraising efforts." It is hard to see how the Hospital or outside entities could communicate appointment reminders, survey patient satisfaction, or make fundraising requests without using contact information like cell phone numbers.

***13** Statutory definitions found in HIPAA also support this interpretation. We agree with the district court that HIPAA compliance does not automatically ensure that a defendant falls within the prior express consent exception to the TCPA. The two statutes provide separate protections, and satisfaction of the first does not trigger compliance with the second. Nor has the FCC issued an order ruling that satisfaction of HIPAA amounts to prior express consent to make autodialed or prerecorded debt collection calls to a cell-phone number. Still, HIPAA's definition of "health information" informs the meaning of the term when the Hospital used it in a required HIPAA notice. *See* 45 C.F.R. § 164.520(a)(1) ("[A]n individual has a right to adequate notice of the uses and disclosures of protected health information ...."). In line with the Hospital's Notice, HIPAA defines "health information" to include "any information ... created or received by a health care provider" that "relates to ... the past, present, or future payment for the provision of health care to an individual." 42 U.S.C. § 1320d(4); *see id.* § 1320d(6) ("The term 'individually identifiable health information' means any information, including demographic information collected from an individual, that—(A) is created or received by a health care provider ... and (B) relates to ... the past, present, or future payment for the provision of health care to an individual, and—(i) identifies the individual; or (ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual."). As reflected on a Registration Form, the Hospital received Mais's wireless number, a piece of information related to future payment.

Ultimately, by granting the Hospital permission to pass his health information to Florida United for billing, Mais's wife provided his cell phone number to the creditor, consistent with the meaning of prior express consent announced by the FCC in its 2008 Ruling. Gulf Coast is entitled to summary judgment precisely because the calls to Mais fell within the TCPA prior express consent exception as interpreted by the FCC. Under the Hobbs Act, the district court lacked jurisdiction to review the Commission's interpretation. Therefore, we reverse the partial grant of summary judgment to Mais and remand to the district court with instructions to enter summary judgment in favor of Gulf Coast on its prior express consent defense.

REVERSED AND REMANDED.

Footnotes

1 Mais's amended complaint also named as a defendant Jack W. Brown, III, vice president and part owner of Gulf Coast. The district court separately granted Brown summary judgment because it found Mais pled no substantive cause against him individually and because it saw no evidence that Brown committed, directly participated in, or otherwise authorized the commission of wrongful acts. No appeal has been taken from that summary judgment order, and thus any claims leveled against Brown are not part of this appeal.

2 In full, § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that

an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

3 ACA International filed a brief in this case as *amicus curiae* in support of Gulf Coast.

4 In *Leyse v. Clear Channel Broadcasting Inc.*, 697 F.3d 360 (6th Cir.2012), a panel of the Sixth Circuit originally held that the Hobbs Act only deprived a district court of jurisdiction "if the action's central object is to either enforce or undercut an FCC order." *Id.* at 374. Thereafter, however, the panel filed an amending and superseding opinion that abandoned the "central object" analysis and concluded that the Hobbs Act limited the district court's jurisdiction over the plaintiff's claims. *See Leyse v. Clear Channel Broad., Inc.*, 545 F. App'x 444, 459 (6th Cir.2013) (unpublished) ("[Plaintiff] knew that Clear Channel's defense would depend on the FCC's exemption provision.").

5 Mais also cites to *United States v. Any and All Radio Station Transmission Equipment*, 204 F.3d 658 (6th Cir.2000), for the proposition that the Hobbs Act does not always strip the district courts of jurisdiction to review FCC orders. The problem is that case is wholly different. It involved, as the Sixth Circuit noted, a forfeiture action, which that court characterized as "quasi-criminal" in nature. *Id.* at 667.

6 Mais relies on a materially distinguishable district court case. In *Moise*, a plaintiff claimed that she had not given prior express consent as interpreted in the 2008 FCC Ruling because she had not provided her cell phone number to the creditor, an independent medical laboratory, and instead had given it only to her doctor. 950 F.Supp.2d at 1252–53. The district court explained, "if the number was given only to Plaintiff's treating physician, then Plaintiff did not give prior express consent to [the laboratory] or its third party collector." *Id.* at 1253. However, the court concluded that "[t]o whom Plaintiff gave his number remains an issue for trial." *Id.* In addition, and in contrast to this case, the district court noted that "the facts do not indicate whether Plaintiff gave his number to his doctor knowing that the doctor would share that number with other creditors of Plaintiff or for the express purpose of giving his number to other creditors." *Id.* at 1254. Here, Mais's wife gave the Hospital permission to pass on the cell phone number to Florida United in connection with the debt.

End of Document

2014 WL 4654478
United States Court of Appeals,
Ninth Circuit.

Jose GOMEZ, individually and on behalf of a class of similarly situated individuals, Plaintiff–Appellant,
v.
CAMPBELL–EWALD COMPANY, Defendant–Appellee.

No. 13–55486. | Argued and Submitted July 11, 2014. | Filed Sept. 19, 2014.

Synopsis
Background: Consumer brought putative class action against advertiser, alleging that advertiser violated the Telephone Consumer Protection Act (TCPA) by instructing or allowing third-party vendor to send unsolicited text messages to consumer's cellular phone. The United States District Court for the Central District of California, Dolly M. Gee, J., 2013 WL 655237, granted summary judgment in favor of advertiser. Consumer appealed.

Holdings: The Court of Appeals, Benavides, Circuit Judge, held that:

[1] consumer's failure to accept advertiser's offer of judgment did not render action moot;

[2] the TCPA restriction on unsolicited automated calls did not violate the First Amendment as applied to unsolicited text messages sent to cellular phones; and

[3] advertiser was not entitled to any immunity.

Vacated and remanded.

West Headnotes (14)

[1] **Telecommunications**
Illegal or Improper Purposes

It is undisputed that a text message constitutes a call for the purposes of the Telephone Consumer Protection Act (TCPA). Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(1)(A)(iii).

Cases that cite this headnote

[2] **Federal Courts**
Telecommunications

Consumer's failure to accept advertiser's offer of judgment did not render moot either his individual claim under the Telephone Consumer Protection Act (TCPA) or his putative class action, arising from alleged transmission of unsolicited automated text messages, notwithstanding that offer was for full amount of claim, plus costs. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(1)(A)(iii).

Cases that cite this headnote

[3] **Federal Courts**
Available and Effective Relief

An unaccepted offer of judgment that would fully satisfy a plaintiff's claim is insufficient to render the claim moot. Fed.Rules Civ.Proc.Rule 68, 28 U.S.C.A.

Cases that cite this headnote

[4] **Federal Civil Procedure**
Effect of Mootness
Federal Civil Procedure
Offer of Judgment
Federal Courts
Class Actions

An unaccepted offer of judgment for the full amount of the named plaintiff's individual

claim, made before the named plaintiff files a motion for class certification, does not moot the class action. Fed.Rules Civ.Proc.Rule 68, 28 U.S.C.A.

Cases that cite this headnote

[5] **Courts**
Decisions of Same Court or Co-Ordinate Court

It is well settled that the court of appeals is bound by its prior decisions.

Cases that cite this headnote

[6] **Courts**
Erroneous or Injudicious Decisions

Although there is exception to the general rule that a court of appeals is bound by its prior decision for precedents that have been overruled, that exception applies only where the relevant court of last resort has undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.

Cases that cite this headnote

[7] **Constitutional Law**
Solicitation; Telemarketing; Automated Dialing
Telecommunications
Validity

The Telephone Consumer Protection Act's (TCPA) restriction on unsolicited automated telephone calls did not violate the First Amendment as applied to unsolicited text messages sent to cellular phones; the restriction was narrowly tailored to further the government's significant interest in protecting privacy. U.S.C.A. Const.Amend. 1; Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(1)(A)(iii).

Cases that cite this headnote

[8] **Constitutional Law**
Narrow Tailoring Requirement; Relationship to Governmental Interest
Constitutional Law
Existence of Other Channels of Expression

The government may impose reasonable restrictions on the time, place, or manner of protected speech, without violating the First Amendment, provided that the restrictions are justified without reference to the content of the restricted speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[9] **Constitutional Law**
Government-Sponsored Speech

The government speech doctrine is a jurisprudential theory by which the federal government can regulate its own communication without the First Amendment constraint of viewpoint neutrality. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[10] **Telecommunications**
Advertising, Canvassing and Soliciting; Telemarketing

Absent a clear expression of Congressional intent to apply another standard, a court must presume that Congress intended to apply the traditional standards of vicarious liability to unsolicited automated telephone calls made by a

third party marketing consultant hired by merchant in violation of the Telephone Consumer Protection Act's (TCPA). Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(1)(A)(iii), (b)(2).

Cases that cite this headnote

[11] **Telecommunications**
Advertising, Canvassing and Soliciting; Telemarketing

A defendant may be held vicariously liable for Telephone Consumer Protection Act (TCPA) violations where the plaintiff establishes an agency relationship, as defined by federal common law, between the defendant and a third-party caller. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(2).

Cases that cite this headnote

[12] **Telecommunications**
Illegal or Improper Purposes

Advertiser was not entitled to any immunity from liability in consumer's action, alleging that advertiser violated the Telephone Consumer Protection Act (TCPA) by instructing or allowing third-party vendor to send unsolicited text messages to consumer's cellular phone. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(1)(A)(iii), (b)(2).

Cases that cite this headnote

[13] **Federal Courts**
Telecommunications

The availability of an immunity or preemption defense to liability under the Telephone Consumer Protection Act (TCPA) is a question of law that is reviewed de novo. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(1)(A)(iii).

Cases that cite this headnote

[14] **States**
Conflicting or Conforming Laws or Regulations

The federal preemption doctrine precludes state claims where the imposition of liability would undermine or frustrate federal interests.

Cases that cite this headnote

Attorneys and Law Firms

Evan M. Meyers (argued), McGuire Law, P.C., Chicago, IL; Michael J. McMorrow, McMorrow Law, P.C., Chicago, IL; and David C. Parisi, Parisi & Havens LLP, Sherman Oaks, CA, for Plaintiff–Appellant.

Laura A. Wytsma (argued), Michael L. Mallow, Christine M. Reilly, and Meredith J. Siller, Loeb & Loeb LLP, Los Angeles, CA, for Defendant–Appellee.

Appeal from the United States District Court for the Central District of California, Dolly M. Gee, District Judge, Presiding. D.C. No. 2:10–cv–02007–DMG–CW.

Before: FORTUNATO P. BENAVIDES,* KIM McLANE WARDLAW, and RICHARD R. CLIFTON, Circuit Judges.

OPINION

BENAVIDES, Circuit Judge:

***1** Plaintiff Jose Gomez appeals adverse summary judgment on personal and putative class claims brought pursuant to the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(1)(A)(iii) (2012). Gomez alleges that the Campbell–Ewald Company instructed or allowed a third-party vendor to send unsolicited text messages on behalf of the United States Navy, with whom Campbell–Ewald had a marketing contract. Because we

conclude that Campbell–Ewald is not entitled to immunity, and because we find no alternate basis upon which to grant its motion for summary judgment, we vacate the judgment and remand to the district court.

I.

The facts with respect to Gomez's personal claim are largely undisputed. On May 11, 2006, Gomez received an unsolicited text message stating:

> Destined for something big? Do it in the Navy. Get a career. An education. And a chance to serve a greater cause. For a FREE Navy video call [number].

The message was the result of collaboration between the Navy and the Campbell–Ewald Company,[1] a marketing consultant hired by the Navy to develop and execute a multimedia recruiting campaign. The Navy and Campbell–Ewald agreed to "target" young adults aged 18 to 24, and to send messages only to cellular users that had consented to solicitation. The message itself was sent by Mindmatics, to whom the dialing had been outsourced. Mindmatics was responsible for generating a list of phone numbers that fit the stated conditions, and for physically transmitting the messages. Neither the Navy nor Mindmatics is party to this suit.

[1] In 2010, Gomez filed the present action against Campbell–Ewald, alleging a single violation of 47 U.S.C. § 227(b)(1)(A)(iii), which states:

> It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—
>
> (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—...
>
> (iii) to any telephone number assigned to a paging service [or] cellular telephone service....

Gomez contends that he did not consent to receipt of the text message. He also notes that he was 40 years old at the time he received the message, well outside of the Navy's target market. It is undisputed that a text message constitutes a call for the purposes of this section. *See Satterfield v. Simon & Schuster, Inc.,* 569 F.3d 946, 952 (9th Cir.2009) ("[W]e hold that a text message is a 'call' within the meaning of the TCPA."). In addition to seeking compensation for the alleged violation of the TCPA, Gomez also sought to represent a putative class of other unconsenting recipients of the Navy's recruiting text messages.

After a 12(b)(6) motion to dismiss was denied, Campbell–Ewald tried to settle the case. Campbell–Ewald offered Gomez $1503.00 per violation, plus reasonable costs, but Gomez rejected the offer by allowing it to lapse in accordance with its own terms.

***2** Campbell–Ewald then moved to dismiss the case under Rule 12(b)(1), arguing that Gomez's rejection of the offer mooted the personal and putative class claims. After the court denied the motion, Campbell–Ewald moved for summary judgment, seeking derivative immunity under *Yearsley v. W.A. Ross Construction Co.,* 309 U.S. 18, 60 S.Ct. 413, 84 L.Ed. 554 (1940). In opposition to the summary judgment motion, Gomez presented evidence that the Navy intended the messages to be sent only to individuals who had consented or "opted in" to receive messages like the recruiting text. A Navy representative testified that Campbell–Ewald was not authorized to send texts to individuals who had not opted in. The district court ultimately granted the motion, holding that Campbell–Ewald is "immune from liability under the doctrine of derivative sovereign immunity." *Gomez v. Campbell–Ewald Co.,* No. CV 10–2007 DMG CWX, 2013 WL 655237, at *6 (C.D.Cal. Feb. 22, 2013). Gomez filed a timely appeal, arguing that the *Yearsley* doctrine is inapplicable.

This Court reviews summary judgment *de novo,* affirming only where there exists no genuine dispute of material fact. *Satterfield,* 569 F.3d at 950; *see also* FED.R.CIV.P. 56(a). We are free to affirm "on any basis supported by the record." *Gordon v. Virtumundo, Inc.,* 575 F.3d 1040, 1047 (9th Cir.2009).

II.

[2] We begin with jurisdiction. Upon Gomez's timely appeal, Campbell–Ewald filed a motion to dismiss for lack of jurisdiction, arguing that the personal and putative class claims were mooted by Gomez's refusal to accept the settlement offer. We denied that motion without prejudice, and now reject Campbell–Ewald's argument on the merits.

[3] Gomez's individual claim is not moot. Campbell–Ewald argues that "whether or not the class action here is moot," the individual claim was mooted by Gomez's rejection of the offer. The company is mistaken. Although this issue was unsettled until recently, we have now expressly resolved the question. "[A]n unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot." *Diaz v. First Am. Home Buyers Prot. Corp.,* 732 F.3d 948, 950 (9th Cir.2013). Because the unaccepted offer alone is "insufficient" to moot Gomez's claim, and as Campbell–Ewald identifies no alternate or additional basis for mootness, the claim is still a live controversy.

[4] Similarly, the putative class claims are not moot. We have already explained that "an unaccepted Rule 68 offer of judgment—for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification—does not moot a class action." *Pitts v. Terrible Herbst, Inc.,* 653 F.3d 1081, 1091–92 (9th Cir.2011). Like the *Pitts* plaintiff, Gomez rejected the offer before he moved for class certification. Gomez's rejection therefore does not affect any class claims.

[5] [6] Campbell–Ewald recognizes that it is asking this panel to depart from these precedents. Yet it is well settled that we are bound by our prior decisions. *Miller v. Gammie,* 335 F.3d 889, 900 (9th Cir.2003) (en banc). Although there is an exception for precedents that have been overruled, that exception applies only where "the relevant court of last resort [has] undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Ibid.* Campbell–Ewald argues that *Pitts* and *Diaz* are clearly irreconcilable with the Supreme Court's recent decision in *Genesis Healthcare Corp. v. Symczyk,* —— U.S. ——, 133 S.Ct. 1523, 185 L.Ed.2d 636 (2013). Campbell–Ewald overstates the relevance of that case, which involved a collective action brought pursuant to § 16(b) of the Fair Labor Standards Act. *Id.* at 1526–27. The defendant argued that the case was mooted by the plaintiff's rejection of a settlement offer of complete relief. *Id.* at 1528. The Supreme Court ultimately agreed, first accepting the lower court's conclusion that the personal claim was moot, and then holding that the named plaintiff had "no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness." *Id.* at 1532.

***3** Campbell–Ewald correctly observes that *Genesis* undermined some of the reasoning employed in *Pitts* and *Diaz*. For example, the *Pitts* opinion referred to the risk that a defendant might "pick off" named plaintiffs in order to evade class litigation. 653 F.3d at 1091 (quoting *Weiss v. Regal Collections,* 385 F.3d 337, 344 (3d Cir.2004)). The *Genesis* Court distanced itself from such reasoning, pointing out that the argument had only been used once by the high Court, and only "in dicta." 133 S.Ct. at 1532 (referring to *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper,* 445 U.S. 326, 339, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980)). Nevertheless, courts have universally concluded that the *Genesis* discussion does not apply to class actions.[2] In fact, *Genesis* itself emphasizes that "Rule 23 [class] actions are fundamentally different from collective actions under the FLSA" and, therefore, the precedents established for one set of cases are "inapplicable" to the other. 133 S.Ct. at 1529. Accordingly, because *Genesis* is not "clearly irreconcilable" with *Pitts* or *Diaz,* this panel remains bound by circuit precedent, and Campbell–Ewald's mootness arguments must be rejected. *Miller,* 335 F.3d at 900.

III.

[7] Campbell–Ewald's constitutional challenge is equally unavailing. The company argues that the statute is unconstitutional either facially or as applied, but its argument relies upon a flawed application of First Amendment principles. Although the district court did not ultimately reach this issue, the record confirms that the challenge was properly raised below.

[8] We have already affirmed the constitutionality of this section of the TCPA. *Moser v. FCC,* 46 F.3d 970, 973–74 (9th Cir.1995). The government may impose reasonable restrictions on the time, place, or manner of protected speech, provided that the restrictions "are justified without reference to the content of the restricted speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (quoting *Clark v. Cmty. for Creative Non–Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (other citations omitted)). In analyzing the section, the *Moser* Court focused on the content-neutral statutory language. "Because nothing in the statute requires the [Federal Communications Commission] to distinguish between commercial and noncommercial speech, we conclude that the statute should be analyzed as a content-neutral time, place, and manner restriction."[3] We then upheld the statute after finding that the protection of privacy is a significant interest, the restriction of

automated calling is narrowly tailored to further that interest, and the law allows for "many alternative channels of communication." *Id.* at 974–75.

Campbell–Ewald does not contest our reasoning in *Moser*. Instead, Campbell–Ewald argues that the government's interest only extends to the protection of residential privacy, and that therefore the statute is not narrowly tailored to the extent that it applies to cellular text messages. The argument fails. First, this Court already applies the TCPA to text messages. *Satterfield,* 569 F.3d at 951–52. Second, there is no evidence that the government's interest in privacy ends at home—the fact that the statute reaches fax machines suggests otherwise. *See* 47 U.S.C. § 227(b)(1)(C). Third, to whatever extent the government's significant interest lies exclusively in residential privacy, the nature of cell phones renders the restriction of unsolicited text messaging all the more necessary to ensure that privacy. After all, it seems safe to assume that most cellular users have their phones with them when they are at home. Campbell–Ewald itself notes that in many households a cell phone *is* the home phone. In fact, recent statistics suggest that over 40% of American households now rely exclusively on wireless telephone service.[4] As a consequence, prohibiting automated calls to land lines alone would not adequately safeguard the stipulated interest in residential privacy. For all these reasons, Campbell–Ewald's argument is without merit.

***4** [9] Nor does the government speech doctrine provide Campbell–Ewald with a meritorious constitutional challenge. Campbell–Ewald argues that military recruiting messages are a form of government speech afforded greater protection by the First Amendment. Campbell–Ewald mischaracterizes the doctrine. The government speech doctrine is a jurisprudential theory by which the federal government can regulate its own communication "without the constraint of viewpoint neutrality." *Downs v. L.A. Unified Sch. Dist.,* 228 F.3d 1003, 1017 (9th Cir.2000), *cert. denied,* 532 U.S. 994, 121 S.Ct. 1653, 149 L.Ed.2d 636 (2001). For example, the First Amendment does not require the federal government to fund messages both for and against abortion. *Cf. Rust v. Sullivan,* 500 U.S. 173, 203, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (upholding, under the government speech doctrine, regulations forbidding certain publicly funded doctors from endorsing abortion). Similarly, in this context, the doctrine would preclude Campbell–Ewald from demanding that the Navy create an advertising campaign that discourages military participation. The government speech doctrine is simply immaterial to the present dispute, in which the plaintiff is not advocating for viewpoint neutrality, but is instead challenging the regulation of a particular means of communication.

IV.

Campbell–Ewald nevertheless argues that it cannot be held liable for TCPA violations because it outsourced the dialing and did not actually make any calls on behalf of its client. *See* 47 U.S.C. § 227(b)(1)(A)(iii) (rendering it unlawful "to make any call" using an automated dialing system). Gomez, in fact, concedes that a third party transmitted the disputed messages. Even so, Campbell–Ewald's argument is not persuasive.

[10] Although Campbell–Ewald did not send any text messages, it might be vicariously liable for the messages sent by Mindmatics. The statute itself is silent as to vicarious liability. We therefore assume that Congress intended to incorporate "ordinary tort-related vicarious liability rules." *Meyer v. Holley,* 537 U.S. 280, 285, 123 S.Ct. 824, 154 L.Ed.2d 753 (2003). Accordingly, "[a]bsent a clear expression of Congressional intent to apply another standard, the Court must presume that Congress intended to apply the traditional standards of vicarious liability...." *Thomas v. Taco Bell Corp.,* 879 F.Supp.2d 1079, 1084 (C.D.Cal.2012), *aff'd,* —— Fed.Appx. ——, 2014 WL 2959160 (9th Cir. July 2, 2014) (per curiam). Although we have never expressly reached this question, several of our district courts have already concluded that the TCPA imposes vicarious liability where an agency relationship, as defined by federal common law, is established between the defendant and a third-party caller.[5]

This interpretation is consistent with that of the statute's implementing agency, which has repeatedly acknowledged the existence of vicarious liability under the TCPA. The Federal Communications Commission is expressly imbued with authority to "prescribe regulations to implement the requirements" of the TCPA. 47 U.S.C. § 227(b)(2). As early as 1995, the FCC stated that "[c]alls placed by an agent of the telemarketer are treated as if the telemarketer itself placed the call." *In re Rules and Regulations Implementing the TCPA of 1991,* 10 FCC Rcd. 12391, 12397 (1995). More recently, the FCC has clarified that vicarious liability is imposed "under federal common law principles of agency for violations of either section 227(b) or section 227(c) that are committed by third-party telemarketers." *In re Joint Petition Filed by Dish Network, LLC,* 28 FCC Rcd. 6574, 6574 (2013). Because Congress has not spoken directly to this issue and because the FCC's interpretation was included in a fully adjudicated declaratory ruling, the interpretation

must be afforded *Chevron* deference. *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.,* 423 F.3d 1056, 1065 (9th Cir.2005) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 980–85, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005)) (other citations omitted), *aff'd,* 550 U.S. 45, 127 S.Ct. 1513, 167 L.Ed.2d 422 (2007); *see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." (footnote omitted)).

***5** Campbell–Ewald concedes that the FCC already recognizes vicarious liability in this context, but argues that vicarious liability only extends to the merchant whose goods or services are being promoted by the telemarketing campaign. Yet the statutory language suggests otherwise, as § 227(b) simply imposes liability upon "any person"—not "any merchant." *See Ali v. Fed. Bureau of Prisons,* 552 U.S. 214, 221, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008) (interpreting the use of "any" as "all-encompassing"); 47 C.F.R. § 64.1200 (interpreting the phrase "any person" to reach individuals and entities). And although the FCC's 2013 ruling may emphasize vicarious liability on the part of merchants, the FCC has never stated that vicarious liability is *only* applicable to these entities.[6] Indeed, such a construction would contradict "ordinary" rules of vicarious liability, *Meyer,* 537 U.S. at 285, 123 S.Ct. 824, which require courts to consider the interaction between the parties rather than their respective identities. *See* RESTATEMENT (THIRD) OF AGENCY (2006) §§ 2.01, 2.03, 4.01 (explaining that agency may be established by express authorization, implicit authorization, or ratification).

Given Campbell–Ewald's concession that a merchant can be held liable for outsourced telemarketing, it is unclear why a third-party marketing consultant shouldn't be subject to that same liability. As a matter of policy it seems more important to subject the consultant to the consequences of TCPA infraction. After all, a merchant presumably hires a consultant in part due to its expertise in marketing norms. It makes little sense to hold the merchant vicariously liable for a campaign he entrusts to an advertising professional, unless that professional is equally accountable for any resulting TCPA violation. In fact, Campbell–Ewald identifies no case in which a defendant was exempt from liability due to the outsourced transmission of the prohibited calls.

[11] Moreover, our own precedent belies any argument that liability is not possible. In our seminal case regarding text messages and the TCPA, we allowed a case to proceed against an analogous marketing consultant who was not "responsible for the actual transmission of the text messages." *See Satterfield,* 569 F.3d at 951. In *Satterfield,* a publisher had instructed a marketing consultant to create a text message campaign advertising a new Stephen King novel. *Id.* at 949. The consultant in turn outsourced the recipient selection and message transmission to two other subcontractors. *Id.* A recipient sued both the publisher and the marketing consultant for alleged violations of the TCPA. *Id.* at 950. The district court entered summary judgment in favor of both defendants, holding that the cellular user had consented to receive advertisements when it signed its cellular service contract. *Id.* We ultimately reversed and remanded the case, holding (*inter alia*) that the cellular service agreement did not constitute "express consent" to receive the advertisement in dispute. *Id.* at 955. So although we did not explain the basis of the defendants' potential liability, we implicitly acknowledged the existence of that basis. The present case affords an opportunity to clarify that a defendant may be held vicariously liable for TCPA violations where the plaintiff establishes an agency relationship, as defined by federal common law, between the defendant and a third-party caller.

***6** Before moving on, we should note that Gomez asks us to endorse another potential source of liability by holding that direct liability applies where a third party is "closely involved" in the placing of the calls. Because the facts are not yet developed, the present case does not require such a determination. We therefore leave that question for another day. *See United States v. Manning,* 527 F.3d 828, 837 n. 8 (9th Cir.2008) ("[W]e simply express no view on issues unnecessary to this [decision]." (citation omitted)).

V.

[12] [13] Finally, we turn to the legal theory underlying the district court's decision. The court entered summary judgment after concluding that Campbell–Ewald is exempt from liability under *Yearsley,* 309 U.S. 18, 60 S.Ct. 413. Gomez contends that *Yearsley* is outdated and inapposite, and that the district court should have applied the standard articulated in *Boyle v. United Technologies Corp.,* 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). The availability of these defenses is a question of law that we review *de novo. In re Hanford Nuclear Reservation Litig.,* 534 F.3d 986, 1000 (9th Cir.2008).

After reviewing the relevant law, we agree with Gomez

that *Yearsley* is not applicable. *Yearsley* established a narrow rule regarding claims arising out of property damage caused by public works projects. The dispute involved erosion caused by efforts to render the Missouri River more navigable. *Yearsley,* 309 U.S. at 19, 60 S.Ct. 413. The Court reasoned that if—as alleged—the contractor's work was in accordance with express Congressional directive and resulted in an unconstitutional taking of property, "the Government has impliedly promised to compensate the plaintiffs and has afforded a remedy for its recovery by a suit in the Court of Claims." *Id.* at 21–22, 60 S.Ct. 413 (citing 28 U.S.C. § 250 (1940)) (other citations omitted). As a consequence, there was an adequate remedy available and no need for action against the private contractor. *Id.* at 22, 60 S.Ct. 413.

It seems clear that the reasoning employed by the *Yearsley* Court is not relevant here. Gomez's claims do not implicate a constitutional "promise to compensate" injured plaintiffs such that an alternate remedy exists. Nor does the case belong in some other venue. *Cf. Myers v. United States,* 323 F.2d 580, 583 (9th Cir.1963) (remanding under *Yearsley* for transfer to Court of Claims). Instead, Congress has expressly created a federal cause of action affording individuals like Gomez standing to seek compensation for violations of the TCPA. In the seventy-year history of the *Yearsley* doctrine, it has apparently never been invoked to preclude litigation of a dispute like the one before us. This Court, in particular, has rarely allowed use of the defense, and only in the context of property damage resulting from public works projects.

In its brief discussion, the district court did not explain its decision to apply *Yearsley* to the facts and issues at bar. The cases cited by the court do not support such an interpretation.[7] At oral argument, we asked Campbell–Ewald to name any authority that might justify the application of *Yearsley* to the facts of this case. Campbell–Ewald responded by pointing to a recent Fifth Circuit decision dismissing a class action under *Yearsley. See Ackerson,* 589 F.3d 196. Yet that case—like *Yearsley* itself—involved allegations of property damage resulting from dredging work undertaken to improve the nation's waterways. *Id.* at 202–03 (listing allegations that the United States and its contractors had irreparably damaged Louisiana's coastline and wetlands in the 1960s, ultimately contributing to the widespread loss of property during Hurricane Katrina). So while the Fifth Circuit's decision may rebut Gomez's argument that *Yearsley* is stale precedent, it does not warrant application of the doctrine to the present dispute.

***7** [14] Nor does the *Boyle* pre-emption doctrine provide Campbell–Ewald with a relevant defense. The doctrine precludes state claims where the imposition of liability would undermine or frustrate federal interests. *See Nielsen v. George Diamond Vogel Paint Co.,* 892 F.2d 1450, 1454 (9th Cir.1990) (explaining that the *Boyle* standard is used to determine when "federal law should displace state law"). *Boyle* involved a wrongful death action brought under Virginia law against a government contractor that had supplied a helicopter to the United States military. *See* 487 U.S. at 502, 108 S.Ct. 2510. After a jury returned a verdict in favor of the plaintiffs, the Fourth Circuit reversed, holding that liability was precluded in part by the federal interest inherent in military decisions. *Id.* at 503, 510, 108 S.Ct. 2510. The Supreme Court agreed, explaining that when "an area of uniquely federal interest" is implicated by a federal purchase, state law is displaced where "a significant conflict exists between an identifiable federal policy or interest and the operation of state law, or the application of state law would frustrate specific objectives of federal legislation...." *Id.* at 507, 108 S.Ct. 2510 (internal brackets, quotation marks, and citations omitted). The Court then remanded after establishing a rule by which courts should determine whether a specific contractor is acting pursuant to a military contract such that the defense is available. *Id.* at 512, 108 S.Ct. 2510.

Although *Boyle* in effect created a defense for some government contractors, it is fundamentally a pre-emption case. The *Boyle* Court established two related rules: (1) a general rule whereby state claims may be pre-empted by federal law, and (2) a specific rule whereby certain military contractors may be exempt from state tort liability in furtherance of that pre-emption. 487 U.S. at 507–08, 512, 108 S.Ct. 2510. In arguing that *Boyle* governs here, Gomez overlooks the pre-emption predicate, assuming that *Boyle* represents a general grant of immunity for government contractors. Yet *Boyle* itself includes footnotes emphasizing the displacement question and indicating that it should not be construed as broad immunity precedent. *Id.* at 505 n. 1, 508 n. 3, 108 S.Ct. 2510. We have already clarified this point, explaining that *Boyle* "is directed toward deciding the extent to which federal law should displace state law with respect to the liability of a military contractor." *Nielsen,* 892 F.2d at 1454. Accordingly, although *Boyle* may apply more broadly than to the facts of that case alone, that broader applicability is rooted in pre-emption principles and not in any widely available immunity or defense.

Returning to the present case, Gomez brings a claim under federal law, so pre-emption is simply not an issue. The *Boyle* doctrine is thus rendered inapposite. Even

Campbell–Ewald—notwithstanding a vested interest in maintaining every possible means of exoneration—admits that a *Boyle* defense is not permissible here. Because the defendant does not assert a *Boyle* defense, we need not belabor the present discussion—we accept Campbell–Ewald's concession that *Boyle* is not relevant.

***8** Campbell–Ewald contends that a new immunity for service contractors was espoused by the Supreme Court in *Filarsky v. Delia,* —— U.S. ——, 132 S.Ct. 1657, 182 L.Ed.2d 662 (2012). Yet the Court did not establish any new theory, and although the *Filarsky* discussion does include a broad reading of the qualified immunity doctrine, *id.* at 1667–68, that doctrine is not implicated by this case. *Filarsky* involved alleged constitutional violations brought pursuant to 42 U.S.C. § 1983. *See id.* at 1661. The Supreme Court granted certiorari to resolve a dispute as to whether one of the defendants—an attorney contracted by municipal government—was eligible for the qualified immunity afforded to his city-employed colleagues. *Id.* at 1660–61. To determine the scope of the doctrine, the Court examined "the 'general principles of tort immunities and defenses' applicable at common law." *Id.* at 1662 (quoting *Imbler v. Pachtman,* 424 U.S. 409, 418, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)). When the examination revealed that part-time and lay officials had been granted immunity throughout the nineteenth century, *id.* at 1665, the Court concluded that the contractor was properly entitled to the same qualified immunity enjoyed by his publicly employed counterparts.

Filarsky has little to offer Campbell–Ewald. The decision is applicable only in the context of § 1983 qualified immunity from personal tort liability. *See, e.g., ibid.* ("[I]mmunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis."). Moreover, the Court afforded immunity only after tracing two hundred years of precedent. Here, not only do we lack decades or centuries of common law recognition of the proffered defense, we are aware of *no* authority exempting a marketing consultant from analogous federal tort liability.

Nor are we persuaded that we should establish the novel immunity asserted by defendants. As the Supreme Court has recognized, immunity "comes at a great cost." *Westfall v. Erwin,* 484 U.S. 292, 295, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988), *superseded by statute on other grounds,* Pub.L. No. 100–694, 102 Stat. 4563 (1988), codified at 28 U.S.C. § 2679(d), *as recognized in Adams v. United States,* 420 F.3d 1049, 1052 (9th Cir.2005). Where immunity lies, "[a]n injured party with an otherwise meritorious tort claim is denied compensation," which "contravenes the basic tenet that individuals be held accountable for their wrongful conduct." *Westfall,* 484 U.S. at 295, 108 S.Ct. 580. Accordingly, immunity must be extended with the utmost care. The record contains sufficient evidence that the text messages were contrary to the Navy's policy permitting texts only to persons who had opted in to receive them. Consequently, we decline the invitation to craft a new immunity doctrine or extend an existing one.

VI.

As explained herein, Campbell–Ewald's four arguments in support of summary judgment each fail. And because the motion was based on pure questions of law, we were not briefed on the factual predicates of liability. Campbell–Ewald has therefore not carried its burden to demonstrate an absence of material fact or to show that it is otherwise "entitled to judgment as a matter of law." FED.R.CIV.P. 56(a). Accordingly, we VACATE the district court's order and remand the case for further proceedings consistent with this opinion.

***9 VACATED and REMANDED.**

The costs shall be taxed against the Defendant–Appellee.

Parallel Citations

14 Cal. Daily Op. Serv. 11,078, 2014 Daily Journal D.A.R. 12,996

Footnotes

* The Honorable Fortunato P. Benavides, Senior Circuit Judge for the U.S. Court of Appeals for the Fifth Circuit, sitting by designation.

1 The company is now known as Lowe Campbell Ewald.

[2] At least ten courts had expressly stated that the *Genesis* analysis does not bind courts with respect to class action claims. *E.g., Epstein v. JPMorgan Chase & Co.,* No. 13 Civ. 4744(KPF), 2014 WL 1133567, at *9 (S.D.N.Y. Mar. 21, 2014) ("The court agrees with Plaintiff that these [prior class action] cases were not affected by the Supreme Court's recent decision in *Genesis*...."); *Knutson v. Schwan's Home Serv., Inc.,* No. 3:12–cv–0964–GPC–DHB, 2013 WL 4774763, at *11 (S.D.Cal. Sept.5, 2013) (concluding that *Pitts* was not affected by *Genesis*). We are not aware of any court that has held otherwise.

[3] 46 F.3d at 973. Campbell–Ewald does not argue that the statute is no longer content neutral insofar as some implementing regulations distinguish between commercial and noncommercial calls. *See* 47 C.F.R. § 64.1200(a)(2) (2014); *cf. Destination Ventures, Ltd. v. FCC,* 46 F.3d 54, 56 (9th Cir.1995) (holding that the TCPA's treatment of commercial facsimile transmissions, 42 U.S.C. § 227(b)(1)(C), is a constitutionally permitted content-based restriction).

[4] *See* Karen Kaplan, *Still have a land line? 128 million don't.,* L.A. TIMES, July 8, 2014, http://www.latimes.com/science/sciencenow/la–sci–sn–wireless–only–householdsin–america–20140708–story.html.

[5] *Ibid. See also Kristensen v. Credit Payment Servs.,* No. 2:12–CV–00528–APG, —— F.Supp.2d ——, 2014 WL 1256035 (D.Nev. Mar. 26, 2014); *In re Jiffy Lube Int'l Inc.,* 847 F.Supp.2d 1253 (S.D.Cal.2012); *Kramer v. Autobytel, Inc.,* 759 F.Supp.2d 1165 (N.D.Cal.2010).

[6] *Dish Network,* 28 FCC Rcd. at 6574. The FCC uses the word "seller," which Campbell–Ewald construes as the merchant whose goods or services are featured in the telemarketing campaign. The FCC actually defines seller as an "entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." *See* 47 C.F.R. § 64.1200(f)(9). We need not determine whether Campbell–Ewald constitutes a seller under this definition, as we conclude that vicarious liability turns on the satisfaction of relevant standards of agency, irrespective of a defendant's nominal designation.

[7] *See Ackerson v. Bean Dredging LLC,* 589 F.3d 196, 204–07 (5th Cir.2009) (applying *Yearsley* in traditional public works context); *Butters v. Vance Int'l Inc.,* 225 F.3d 462, 466 (4th Cir.2000) (adjudicating immunity under the Foreign Sovereign Immunity Act); *Myers,* 323 F.2d at 583 (applying *Yearsley* to property loss resulting from highway construction).

End of Document

Faculty Biography: Chris Burnside

Member | Frost Brown Todd | Louisville, KY

502.568.0245 | cburnside@fbtlaw.com
http://www.frostbrowntodd.com/professionals-christopher_burnside.html

Chris has been with the Firm over 20 years and is a member of the litigation department in Louisville, Kentucky. His practice of providing fresh perspectives and aggressive representation has resulted in client demand for his work in over 15 states. This distinction has evolved from his genuine client interest from early in his career, treating client matters as his own and advocating on their behalf.

Chris has successfully handled complex class actions, insurance coverage, bad faith, and fire cases in federal and state courts in Alabama, Arkansas, Arizona, California, Florida, Indiana, Kentucky, Maryland, Mississippi, New York, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia, Wisconsin and Washington, DC.

He began his practice with the Firm in the tort and insurance practice group, handling insurance coverage, fraud and bad faith matters. Chris also has chaired the Firm's e-discovery litigation review group and was instrumental in starting the Firm's information management and electronic discovery group. Chris has defended class action lawsuits involving construction products, insurance claim settlement software, and tax issues.

Practice Areas

- Class Actions
- Fire and Explosion Litigation
- Litigation
- Privacy and Information Security Law
- Tort and Insurance Defense

Concentrations

- Complex and Class Action Defense
- Insurance Related Matters
- Trial Practice

Highlights and Recognitions

- Peer Review Rated, Martindale-Hubbell®

Education

- University of Louisville, Louis D. Brandeis School of Law, J.D., 1989
- Marshall University, B.A., 1985