

The Ninth and Seventh Circuits Revive Robocall Suits Under the TCPA

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Courts have seen a flurry of activity in the Telephone Consumer Protection Act (TCPA) realm this year—and August was no exception. In April 2021, the Supreme Court’s *Facebook v. Duguid*, 141 S. Ct. 1163 (2021), settled the long-debated question of what constitutes an automatic telephone dialing system under the TCPA, 47 U.S.C. § 227. Many anticipated the Court’s willingness to narrow the scope of claims brought under the statute would narrow the number of lawsuits brought under the TCPA. But TCPA cases continue to proliferate, and two appellate courts recently revived claims based on the TCPA.

On August 10, 2021, the Ninth Circuit revived a lawsuit against Fraser Financial and Insurance Services, holding that job recruitment robocalls received by cell phones fall within the TCPA’s scope if the call “did not involve an emergency and was not made with [the consumer’s] prior express consent.” *Loyhayem v. Fraser Fin. & Ins. Servs., Inc.*, ---F. 4th---, 2021 WL 3504057, *2 (9th Cir. Aug. 10, 2021). The TCPA generally makes it illegal to place robocalls to someone’s home phone or cell phone. The Ninth Circuit held that the district court misread the governing robocall consent standards in dismissing the action. While the plaintiff admitted that the robocalls did not involve “advertising or telemarketing”—which are prohibited under the TCPA—the Ninth Circuit rejected the argument that only robocalls involving “advertising or telemarketing” are subject to the TCPA. *Id.* Rather, the Ninth Circuit noted that the TCPA applies to “any call” that is “made to a cell phone using an automatic telephone dialing system or an artificial or pre-recorded voice, unless the call is made either for emergency purposes or with the prior express consent of the person being called,” and that such consent be given either orally or in writing. *Id.* The Ninth Circuit found that the plaintiff’s allegations that he had not consented orally or in writing to receiving Fraser Financial’s call were sufficient to survive a motion to dismiss. *Id.* at *3.

That same day, the Seventh Circuit also revived a TCPA robocall lawsuit. *See Bilek v. Fed. Ins. Co., et al.*, ---F. 4th---, 2021 WL 3503132 (7th Cir. Aug. 10, 2021). In an action brought against Federal Insurance Co. (Federal), a health insurance company, and Health Insurance Innovations, a health insurance technology company with which Federal contracted to sell insurance, the plaintiff alleged a vicarious liability theory under the TCPA based on the companies’ contracting with agents to telemarket Federal’s health insurance, thus generating unauthorized robocalls on the companies’ actual authority, apparent authority, and ratification. The district court dismissed the action, finding

that the plaintiff failed to allege an agency relationship necessary to prove the companies made unsolicited robocalls advertising their services. The Seventh Circuit reversed, holding that the plaintiff had alleged enough at the pleading stage to establish both an agency relationship with Federal and specific personal jurisdiction over Health Insurance Innovations. While the Seventh Circuit’s opinion focused on whether the plaintiff had alleged enough facts to establish that an agency relationship existed and explicitly held—for the first time—that an agent’s conduct attributable to a principal established personal jurisdiction, it is notable that the appellate court made these findings in the context of allowing robocall claims under the TCPA to proceed.

It is too soon to tell whether the Seventh and Ninth Circuits’ decisions will broaden the scope under which future plaintiffs may bring robocall-based claims under the TCPA. Nonetheless, they suggest that *Duguid* will not put an end to TCPA lawsuits, which look like they are here to stay.

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