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Ninth Circuit dismisses TCPA claim, finds recipient's insurance enrollment form constituted "prior express consent"

by Jeff Fisher

Takeaway: A recent Ninth Circuit decision holding that the plaintiff had provided "prior express consent" to receive calls from a third-party telephone consultant shows that the scope of "prior express consent" is based entirely on the language of the consent form. A carefully worded consent form is thus critical to avoiding TCPA liability.

In *Fober v. Mgmt. & Tech. Consultants, LLC* 886 F.3d 789 (9th Cir. 2018), the Ninth Circuit upheld the district court's grant of summary judgment in favor of Management and Technology Consultants, LLC ("MTC"), finding that, because the plaintiff (Audrey Fober) had provided "prior express consent," MTC did not violate the TCPA by calling her through an automatic telephone dialing system ("ATDS").

Prior to receiving the calls, Fober had signed an enrollment form and provided her telephone number to her insurance provider, Health Net. The enrollment form provided that Health Net "*may disclose this information for purposes of* treatment, payment and health plan operations, including but not limited to, utilization management, *quality improvement*, disease or case management programs." After visiting a doctor provided by the Health Net plan, she received follow-up calls asking her to take a patient satisfaction survey about her doctor. MTC had contracted with her doctor's physician group to conduct the surveys. Foder sued MTC, claiming that the calls violated the TCPA.

The TCPA prohibits use of an ATDS to call a number assigned to a cellular telephone service unless the call is made with the recipient's "prior express consent." The issue for the court was whether the scope of the consent in the enrollment form included survey calls from MTC.

Fober argued she had only consented to calls by Health Net and concerning the quality of *Health Net's* services. She did not consent to receiving calls from third parties, like MTC, about the quality of services by a third party, her doctor.

The Ninth Circuit disagreed with Fober's narrow reading of the enrollment form. To establish "prior express consent," a call must relate to the reason why the called party provided her number. So long as the consent language is sufficiently broad to encompass the subject of the call, the identity of the caller is irrelevant.

Through the enrollment form, Fober had consented to Health Net disclosing her phone number for the purpose of "quality improvement." The Ninth Circuit found that "quality improvement" was broad enough to cover the quality of service provided by a doctor assigned to Fober through her Health Net health

plan. The court further held that it did not matter that Fober received the call from MTC, not Health Net. The enrollment form allowed Health Net to "disclose" her information, including her telephone number, meaning she necessarily authorized entities other than Health Net to use her telephone number for the listed purposes.

Because the court found that Fober had provided "prior express consent," it affirmed the district court's grant of motion for summary judgment in favor of Health Net.