

Vicarious Liability for Sending Texts Possible

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A group of plaintiffs allege that they received unauthorized Jiffy Lube text messages from Heartland, a Jiffy Lube franchisee. Some of the plaintiffs had apparently given their phone numbers to Heartland on their invoices. The messages were sent by a third-party vendor, TextMarks, which sends messages on its clients' behalf. The plaintiffs sued both entities. Heartland filed a motion to dismiss, arguing that it did not send the messages, but only engaged TextMarks, which in turn sent the messages. The court rejected the motion, finding that Heartland could be held liable, even if it did not send the messages itself, but hired someone else to do so. The court did not rule substantively on whether Heartland had obtained sufficient consent by obtaining phone numbers on the invoices, although suggested that this alone (without, for example, specific consent language) would not be enough. Heartland also made a First Amendment challenge to the TCPA, arguing that the government interest was to stop "random or sequential generation and dialing of cellular telephone numbers," (as under the TCPA using such technology to send a text requires prior consumer consent). The Southern District of California disagreed, and said instead that the government interest was to reduce the number of unwanted text messages and to protect consumer privacy.

TIP: If you hire a third party vendor to send text messages on your behalf, work with that vendor to make sure you have obtained suitable consent from consumers. Additionally, if collecting consumer numbers, it is dangerous to rely on an "implied consent" theory. Companies should instead describe what types of text messages might be sent, and ask for permission to send such messages (as well as otherwise following industry standards and guidelines).

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