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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATHAN CHENNETTE; LARRY AKINS; GARY ALGER; GABRIEL ANGUIANO; JOSHUA BARKDULL; R. B. BEAL; RORY BOND; VADIM BONDAR; CHRISTOPHER BORGES; CHARLENE BRANHAM; ROGER BURT; ADAM BYERLEY; STEFANIE CHRISTOPHERSON; JASON COULTER; TRAVIS CRONE; JOSE DE LA MORA; STEVEN DICK; GREG DODGSON; BRIANA ETHINGTON; JONATHON FORSYTHE; DAVID FROST; SCOTT GLUBAY; STRYDER HARTLEY; JOSEPH HARTSOUGH; ANDREA HATCH; NATHANIEL HOOD; NICHOLAS JONES; TOM KEFFER; ROGER KENNEDY; MICHAEL LARSON; JONAH LUCHT; CHRISTIAN LYNESS; JONATHAN MCCORMICK; APRIL MICHAEL; NICK MILLER; GABRIEL MIRANDA; ALFONSO MIRANDA; MICHAEL MONZO; JAMES PAYNE; ROBERT PELCHER; SEAN PRIEST; KYLE ROBB; JOHN ROWE; JAKE ROZSA; RON SCHAEFER; OWEN SHAW; GEORGE SIMMONS; MICHAEL SMITH; LEVI STODDARD; JEREMY VOGEL; NICOLE WOOD,

Plaintiffs-Appellants,

No. 20-35962

D.C. No. 1:20-cv-00201-SRB

OPINION

v.

PORCH.COM, INC.; GOSMITH INC.;
MATTHEW EHRLICHMAN; BRENTON
MARRELLI; DARWIN WIDJAJA,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Idaho
Stephen R. Bough, District Judge, Presiding

Argued and Submitted October 4, 2021
Portland, Oregon

Before: William A. Fletcher, Sandra S. Ikuta, and Daniel A. Bress, Circuit Judges.

Opinion by Judge W. Fletcher;
Concurrence by Judge Bress;
Partial Dissent by Judge Ikuta

SUMMARY*

Telephone Consumer Protection Act

The panel reversed the district court's judgment dismissing a complaint, brought by 51 individuals who are home improvement contractors, alleging violations of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227(b) and (c); and remanded.

Defendants are GoSmith, Inc., Porch.com, Inc. (which acquired GoSmith), and three individual corporate officers.

The TCPA prohibits calls using automatic telephone dialing systems ("ATDS") to cell phones, *see* 47 U.S.C. § 227(b), and telephone solicitations sent to residential telephone subscribers who have registered their phone numbers on the national do-not-call registry, *see* 47 U.S.C. § 227(c). Both provisions provide private causes of action for damages and injunctive relief.

The complaint alleges that defendants' use of ATDS to plaintiffs' cell phones violated (and continues to violate) § 227(b); and that defendants' text messages to plaintiffs' cell phones that were (and are) registered on the national do-not-call registry violated (and continue to violate) § 227(c). The district court assumed that plaintiffs have Article III standing but held they lack statutory standing.

Defendants argued that plaintiffs lack Article III standing because they have solicited business inquiries from potential customers and therefore have not suffered a concrete and particularized injury in receiving solicitations from defendants. The panel disagreed, noting that plaintiffs did not expressly consent to receive text messages from GoSmith, which sought to sell information about potential clients, and their alleged injuries are particularized.

The panel also held that plaintiffs have statutory standing under § 227(b) and (c) of the TCPA. Defendants argued that the TCPA protects only individuals from unwanted calls, and that plaintiffs, as home improvement contractors, fall outside of

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

TCPA's zone of interest. Because the statutory text includes not only "person[s]" but also "entit[ies]," the panel concluded that all of the plaintiffs have standing to sue under § 227(b) of the TCPA.

Those plaintiffs who have placed their cell phone numbers on the national do-not-call registry allege additional claims under § 227(c). Noting, correctly, that § 227(c) and its implementing regulations apply only to "residential" telephone subscribers, defendants argued that because plaintiffs use their cell phones both for personal calls and for calls associated with their home improvement businesses, they do not qualify as residential subscribers. The disputed question was whether a cell phone that is used for both business and personal purposes can be a "residential" phone within the meaning of § 227(c). The panel noted that in the view of the Federal Communications Commission (FCC), a subscriber's use of a residential phone (including a presumptively residential cell phone) in connection with a home-based business does not necessarily take an otherwise residential subscriber outside the protection of § 227(c). Relying on the FCC's regulations and orders, the panel concluded that a presumptively residential cell phone can be residential even when used for both personal and business purposes. In the absence of FCC guidance on the precise question of when a mixed-use phone ceases to become a residential phone or a business phone, the panel held that plaintiffs' registered cell phones that are used for both personal and business purposes are presumptively "residential" within the meaning of § 227(c). At the motion to dismiss stage, the panel therefore concluded that these plaintiffs have standing to sue under § 227(c). The panel wrote that after discovery, defendants may seek to argue that they have rebutted the presumption by showing that plaintiffs' cell phones are used to such an extent and in such a manner as to be properly regarded as business rather than "residential" lines.

Concurring, Judge Bress wrote to address the dissent's claims that the majority "usurps the role of the Federal Communications Commission" and enacts a regulatory framework that is based on the majority's "own policy preferences." He wrote that the majority opinion is correct to conclude that wireless users may be "residential subscribers" depending on how they use their phones; and that this conclusion is supported by the FCC's guidance, the conclusions of other courts, and plain common sense.

Dissenting in part, Judge Ikuta wrote that the majority usurps the role of the FCC and creates its own regulatory framework for determining whether a cell phone is actually a "residential telephone," instead of deferring to the FCC's narrower and more careful test.

COUNSEL

James S. Wertheim (argued), LawHQ PC, Pepper Pike, Ohio; Thomas Alvord, Rebecca A. Evans, and Crystal L. Cooke, LawHQ LLC, Salt Lake City, Utah; for Plaintiffs-Appellants.

Benjamin G. Shatz (argued) and Christine M. Reilly; Manatt, Phelps & Phillips LLP, Los Angeles, California; Kristin E. Haule, Greenberg Glusker Fields Claman & Machtinger LLP, Los Angeles, California; for Defendants-Appellees.

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