

FCC Opens the Door to Vicarious Liability for Third-Party Telemarketing Under Certain Conditions

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In response to two petitions for declaratory ruling, on May 9, 2013, the Federal Communications Commission ("FCC") ruled that sellers may be held vicariously liable under the Telephone Consumer Protection Act ("TCPA") for unlawful telemarketing by third-parties under certain circumstances. The FCC's Declaratory Ruling addresses third-party liability for violations of the Do Not Call ("DNC") provisions (contained in section 227(c) of the Communications Act) and of the prerecorded message restrictions (contained in section 227(b)). The Commission ruled that, under both provisions, a seller may be held vicariously liable for violative calls placed by third-party marketing agents under principles of the federal common law of agency. While this ruling likely will quell some TCPA litigation, it also may create further controversy over the meaning and significance of the Commission's "illustrative examples" of evidence that the FCC states may demonstrate vicarious liability under section 227(b).

Background

The TCPA restricts, among other things, the use of telemarketing by persons marketing goods and services. Among its restrictions, the TCPA makes it unlawful for a person to "initiate" a telephone call to a residential line and to wireless numbers for non-emergency purposes using an artificial or prerecorded voice without the prior express consent of the called party. The TCPA also authorized the FCC to establish a national DNC database and makes it unlawful for any person to initiate a telephone solicitation to a residential telephone subscriber registered in the DNC database.

The Declaratory Ruling results from primary jurisdiction referrals made by courts in two cases involving DISH Network, LLC. In those cases, the plaintiffs allege that DISH Network should be held liable under the TCPA for telemarketing calls allegedly placed by independent retailers that sell DISH services. The courts each referred questions to the FCC under the doctrine of primary jurisdiction to determine whether the TCPA authorized an action against an entity for the telemarketing conduct of a third party and, if so, under what circumstances. After public comment on the petitions for declaratory ruling, the Commission issued its Declaratory Ruling.

Vicarious Liability of Sellers

Initially, the FCC addressed the issue of whether a seller can be directly liable for calls made by third parties. On this issue, the Commission ruled that direct liability under the TCPA attaches only to the person or entity that "initiates" a telephone call. A person or entity initiates a call "when it takes the

steps necessary to physically place a telephone call." The mere fact that a company produces or sells a product does not mean that it is initiating telephone calls that are placed by resellers that telemarket the product.

Nevertheless, the Commission found that sellers may be held vicariously liable under the federal common law of agency for TCPA violations committed by third party telemarketers. The FCC reached this result for both violations of the DNC provisions and for violations of the prerecorded call provisions, despite different language in the two governing sections.

The Commission explained that the federal common law of agency includes the "classical" definition of agency where the fiduciary relationship arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and be subject to the principal's control, or if the principal ratifies the acts of a third party by knowingly accepting the benefits of such acts. "Thus, a seller may be bound by the unauthorized conduct of a telemarketer if the seller 'is aware of ongoing conduct encompassing numerous acts by [the telemarketer]' and the seller 'fail[s] to terminate,' or, in some circumstances, 'promot[es] or celebrat[es]' the telemarketer."

The Commission further stated that potential vicarious liability under the agency test also may include "circumstances where a third party has apparent (if not actual) authority," and that such "apparent authority holds a principal accountable for the results of third-party beliefs about an actor's authority to act as an agent when the belief is reasonable and is traceable to a manifestation of the principal." Thus, "a principal may create apparent authority by appointing a person to a particular position," or by permitting "an agent to acquire a reputation of authority in an area or endeavor by acquiescing in conduct by the agent under circumstances likely to lead to a reputation." The Commission also underscored that "[r]estrictions on an agent's authority that are known only to the principal and the agent do not defeat or supersede the consequences of apparent authority for the principal's legal relations with others," and that, in "such circumstances, for example, the presence of contractual terms purporting to forbid a third-party marketing entity from engaging in unlawful telemarketing activities would not, by themselves, absolve the seller of vicarious liability."

Accordingly, the Commission found that the DNC section of the TCPA (section 227(c) of the Communications Act), which authorizes any person to sue for violations based on calls placed "by or on behalf of" a company incorporates federal common law agency principles of vicarious liability. The Commission, however, left open the possibility that it could interpret section 227(c) to permit a broader standard of liability for DNC violations, but stated that any such change in interpretation could be made only after a notice and comment rulemaking proceeding.

For prerecorded message violations (governed by section 227(b), which does not contain similar "on behalf of" language), the Commission concluded that vicarious liability also is available under federal common law of agency principles, including principles of apparent authority. The Commission found that this interpretation would reasonably advance the goals of the TCPA and is consistent with judicial and agency precedent.

In dismissing arguments that such vicarious liability might unacceptably heighten business risk by making liability unpredictable, the Commission explained that "[s]ellers can simultaneously employ third-party telemarketers and protect their legitimate commercial interests by exercising reasonable diligence in selecting and monitoring reputable telemarketers and by including indemnification clauses in their contracts with those entities," and that now, "sellers will have an incentive to carefully choose their telemarketers to ensure compliance and to force consistent violators out of the marketplace."

The Commission further clarified that a manufacturer that simply puts its product in the chain of commerce is not likely to be affected by the Declaratory Ruling at all because, to the extent "a store is selling on its own account – *i.e.*, it has purchased goods from a manufacturer and is re-selling them – the manufacturer would not be a seller at all" under the TCPA.

Illustrative Examples

In the portion of the Declaratory Ruling likely to create the most controversy, the Commission offered "illustrative examples" of evidence that the FCC states may demonstrate apparent authority under the prerecorded message provisions of section 227(b). The Commission offered the following as purported guidance in the area:

1. Apparent authority (and thus vicarious liability) may be supported by evidence that the seller "allows the outside sales entity access to information and systems that normally would be within the seller's exclusive control";
2. The ability of an outside sales entity to enter consumer information in the seller's systems and its authority to use the seller's trademarks "may also be relevant";
3. Whether the seller wrote or reviewed the outside entity's telemarketing scripts "may also be persuasive"; and
4. If the seller knew or reasonably should have known of a third party's telemarketing violations and failed to take effective steps within its power to address the conduct, the seller could be held responsible for the conduct.

The FCC stated that these factors may be sufficient, at a minimum, to shift the burden to a seller to demonstrate that a reasonable consumer would not assume that the telemarketer is acting as the seller's authorized agent.

These examples sparked a lengthy and vigorous dissent by one of the Commissioners. Commissioner Pai, dissenting in part, objected that "it is not the Commission's place to opine on the proper contours of the federal common law of agency" and asserted that this discussion is not entitled to the traditional judicial deference accorded agency interpretations. The dissent further criticized the Declaratory Ruling with respect to the "illustrative examples," asserting that the conclusions reached may require fact specific inquiries beyond the scope of the record before it. Thus, "[r]ather than clarifying the common law of agency, these dicta only muddy it, to the detriment of both consumers and businesses that want to leave or avoid the courtroom."

Impact of the Declaratory Ruling

The Declaratory Ruling resolves a central question that is raised in a number of TCPA cases. Under this Ruling, sellers may only be held liable for actions of those third party telemarketers that are determined to be agents, applying the federal common law of agency. Moreover, a manufacturer that simply puts a product in the chain of commerce that is later resold by a seller is not likely to be subject to vicarious liability, provided that it does not otherwise trigger the TCPA's seller definition.

With respect to how and under what circumstances the federal common law of agency will be applied to find a seller vicariously liable for the acts of third parties, the future is unclear – particularly with respect to claims based on alleged apparent authority. In these situations, it

remains to be seen whether the FCC's "illustrative examples" of such apparent authority will influence courts in interpreting how the federal common law of agency should apply to the specific facts of a particular case.

Companies that work with third party retailers can at least take some solace in the Commission's finding of federal common law of agency, rather than strict liability, and the Commission's statement that such companies can "protect their legitimate commercial interests by exercising reasonable diligence in selecting and monitoring reputable telemarketers and by including indemnification clauses in their contracts with those entities." At a minimum though, the Declaratory Ruling is a good reminder to carefully select those who are authorized to sell the company's products or services, and to reasonably assess whether such third parties may use telemarketing in such efforts. Companies should consider whether, in light of this TCPA Ruling, any modifications may be prudent to the company's oversight and monitoring of such third parties' practices to reduce the risk of allegations that the third party engaged in unlawful telemarketing on the company's behalf.

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