

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

May 15, 2013

On May 9, 2013, the Federal Communications Commission 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 and prerecorded message restrictions of the Communications Act. 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.

The Declaratory Ruling thus resolves a central question that is raised in a number of TCPA lawsuits: 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 affected by this Ruling, 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 and whether the FCC’s “illustrative examples” of such apparent authority set forth in the Ruling will influence courts in interpreting how the federal common law of agency should apply to the specific facts of a particular case.

For more on this decision, please reference the [Kelley Drye client advisory](#).