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FCC Rules Ordinary Principles of Agency Apply to Alleged TCPA Violations

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One of the most frequently litigated issues in Telephone Consumer Protection Act cases is whether a defendant can be held liable for violations of the TCPA committed by another person. On May 9, 2013, the FCC issued its declaratory ruling on petitions filed by Philip Charvat and DISH Network, holding that the ordinary principles of agency set forth in the "federal common law" apply to alleged violations of both 47 U.S.C. § 227(b) and 227(c). The ruling is significant because it confirms that companies that do not exercise undue levels of control over their telemarketers or their call centers will not be held liable when those third-parties violate the TCPA.

Often companies hire a third-party to engage in marketing "on their behalf." Such third-party marketers often subcontract with yet another company to engage in telemarketing, and that sub-contractor may subcontract yet again with a company to actually make calls. The company that actually places the calls is often outside of the United States or otherwise immune from judgment. The company for whom the marketing activity is being conducted is often unaware of the identities of the subcontractors. Yet, that company is the one whose name is being used in the marketing campaign, and that company is the company that will ultimately benefit from the campaign. Significantly, that company is often easily sued and may have the wherewithal to pay a judgment. Plaintiffs' class action lawyers are thus encouraged to sue those companies.

The question that courts face is whether such companies can be held liable for a violation of the TCPA by a call center that may be several steps removed from the actual defendant. The issue is complicated by the fact that two different subsections of 47 U.S.C. § 227 appear to apply different standards to the analysis. Section 227(c)(5), which makes it unlawful to call a person more than once within any 12 month period if that person has requested to be placed on the caller's "do not call" list, states that both the party making the call as well as the party on whose behalf the call is made may be held liable for a violation. Section 227(b)(3), on the other hand, which makes it unlawful to make telemarketing calls to consumers' cell phones using an automatic telephone dialing system or an artificial or pre-recorded voice without their express consent, does not contain the "on behalf of" language of Section 227(c)(5). The inclusion of the "on behalf of" language in subsection (c)(5) and exclusion of that language from subsection (b) suggests that Congress may have intended a different analysis in applying each subsection.

Some cases involve allegations of violation of both parts of the TCPA. These cases might therefore involve a situation where a different standard for vicarious liability applies to each claim.

Courts have not been entirely consistent in their application of the law. Many have held that ordinary principles of agency and vicarious liability apply to claims brought pursuant to Section 227(b)(3). *See Mey v. Pinnacle Security, LLC*, No. 5:11CV47, 2012 WL 4009718, *4 (N.D. W.Va. Sept. 12, 2012); *Thomas v. Taco Bell Corp.*, 879 F. Supp. 2d 1079, 1084-1086 (C.D. Cal. 2012). Others have indicated that they believe that the company whose products or services are being marketed in the calls bears responsibility for all calls made "on its behalf." Those courts reason that a company ought not be permitted to hire someone else to violate the TCPA for it, particularly when the call center or telemarketer may be located in a foreign country or be judgment proof. *Birchmeier v. Caribbean Cruise Line, Inc.*, No. 12 C 4069, 2012 WL 7062748 (N.D. Ill. Dec. 28, 2012) (stating in dicta that the argument that a defendant could simply hire someone else to violate the TCPA on its behalf and "get off scot-free" as "absurd indeed").

In *Charvat v. Echostar Satellite*, LLC, 676 F. Supp. 2d 668 (S.D. Ohio 2009), the plaintiff asserted that telemarketers for Echostar had made numerous calls in violation of the TCPA. Echostar moved for summary judgment, arguing that if the TCPA violations occurred, they were committed by independent contractors of Echostar and therefore Echostar could not be held liable. The District Court granted the motion. Under Ohio law, the telemarketers were not Echostar's agents because Echostar did not have the right to control the manner and means by which the telemarketers conducted their business. On appeal, the Sixth Circuit found that the question of what standard to apply to determine when a person may be held vicariously liable for a violation of the TCPA

"implicate[s] the FCC's statutory authority to interpret the Act. . . ." *Charvat v. Echostar Satellite, LLC,* 630 F.3d 459, 465-66, 468 (6th Cir. 2010). It referred the matter to the FCC.

Meanwhile, the Federal Trade Commission and the Attorneys General of several states sued DISH Network in Illinois for alleged violations of the TCPA. See *United States v. DISH Network, LLC*, 667 F. Supp. 2d 952, 956 (C.D. Ill. 2009). Once again the issue of vicarious liability was squarely presented. DISH itself had not made the calls in issue. The calls had been made by DISH dealers and telemarketers hired by those dealers. The court denied DISH's motion to dismiss, holding that the meaning of the phrases "on whose behalf" and "on behalf of" used in the TCPA suggested that "an act by a representative of, or an act for the benefit of, another" might not require establishing an actual agency relationship. Therefore, following the lead of the Sixth Circuit in *Charvat*, the district court stayed further proceedings and directed the parties to seek an interpretation from the FCC.

The FCC issued a Public Notice seeking comment on the petitions for declaratory ruling. Public Notice, DA 11-594 (rel. April 4, 2011). Numerous persons submitted comments.

While all of this was occurring, hundreds of TCPA class actions were filed around the country. Many seek company-crushing damages. Several very large settlements were reached and approved, leading to more cases being filed. Many of these cases present issues related to whether the primary defendant may be held liable for violations of the TCPA by some other party seeking to market the primary defendant's goods or services.

On May 9, 2012, the FCC issued its declaratory ruling on the petitions in the *Charvat v. Echostar* and *United States v. DISH Network* matter. (FCC-13-54A1 ("Dec. Ruling")). The FCC held that a defendant "may be held vicariously liable under federal common law principles of agency for TCPA violations committed by third-party telemarketers." (Dec. Ruling at ¶ 28). The FCC went further, though, and stated that this vicarious liability may be determined "under a broad range of agency principles, including not only formal agency, but also principles of apparent authority and ratification." *Id.*

The FCC offered some "illustrative examples" as guidance to when a company might be held liable for a telemarketer's or call center's violation of the TCPA. It wrote:

> For example, apparent authority 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, including: access to detailed information regarding the nature and pricing of the seller's products and services or to the seller's customer information. The ability by the outside sales entity to enter consumer information into the seller's sales or customer systems, as well as the authority to use the seller's trade name, trademark and service mark may also be relevant.

(Decl. Ruling at ¶ 46). The FCC also stated that knowledge by the defendant of a violation of the TCPA, and steps taken to ensure compliance with the TCPA were relevant to the question of whether the defendant could be held liable for a violation committed by another person.

It would appear that the FCC held that this standard applies not only to subsection (b)(3), but also to subsection (c)(5). In other words, at least according to the FCC's latest pronouncement, the standard for vicarious liability would appear to be the same for both subsections. But the FCC explicitly makes this unclear, by saying:

> To be clear, and contrary to the partial dissent's contention, we do not find that the statute necessarily provides for a single standard of third-party liability for prerecorded call violations and do-not-call violations. Instead, we leave open the possibility that we could interpret section 227(c) to provide a broader standard of vicarious liability for do-not-call violations. We simply observe that, in light of our current rules, which do treat these provisions analogously, we could not come to such a conclusion in a declaratory ruling proceeding, but only after notice and comment rulemaking. Thus, it may well be that the Commission could ultimately decide that "on behalf of" liability goes beyond agency principles.

(Decl. Ruling at ¶ 32).

The FCC's long-anticipated ruling provides more guidance for the courts to use in determining whether the facts of any given case justify the imposition of vicarious liability upon defendants for violations of the TCPA committed by third-party telemarketers. In short, if the third-party telemarketer is an agent of the defendant under the federal common law of agency, the defendant will be held responsible. However, absent knowledge of the violations or undue levels of control of the third-party telemarketer by the defendant, such liability will be limited to the person actually committing the violation.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors:

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