The Court denied the petition for *certiorari* without comment. *Blatt was represented by Joshua G. Vincent, David M. Schultz, John P. Ryan and Carson R. Griffis of Hinshaw & Culbertson in Chicago. Oliva was represented by Courtney Weiner in Washington, D.C.*

LITIGATION STRATEGIES

TCPA VICARIOUS LIABILITY CLASS-ACTION CLAIMS: AVOIDING THE 'DRAGNET'

By Frank A. Hirsch, Jr.

"Dragnet" was a historic and popular radio then television show starring Jack Webb as L.A. police officer Joe Friday who famously directed female witnesses to limit themselves to "just the facts, ma'am." Whether someone was caught up in officer Friday's dragnet depended on factual specifics relevant to charged illegalities.

So it is with vicarious liability in the context of alleged TCPA violations based on the use of auto dialers or pre-recorded messages to communicate with consumers. Exposure to the dragnet of TCPA liability, as a party which did not actually make the calls/texts/faxes to the consumer, is dependent on the concepts of agency.

Congress enacted the TCPA in 1991 to ban certain types of unsolicited phone calls, text messages, and faxes. The law provides a private right of action for statutory damages of $500 per violation, or as much as $1,500 per violation if the conduct was "willful." Despite the legislative history suggesting that the statute was intended to permit consumers to seek a modest remedy on an individual basis, the plaintiff's bar has seized on the TCPA as a mechanism for aggregating the claims of large numbers of people seeking millions of dollars.

Being caught in a dragnet is no fun and can be very expensive in class action cases seeking trebled statutory penalties and attorneys' fees. After an 8-year steady increase in volume from 2009 to 2016, TCPA filings in 2017 totaled almost 4,400 cases, approximately 1,000 of them putative class actions. While the volume may have peaked, TCPA class actions still plague a host of financial services companies (*Web Recon 2017 Year in Review*, Jan. 28, 2018).

Take this one example. After four years of hard-fought litigation (including twice losing on motions to determine the vicarious liability issue, as a matter of law) and just four days before trial, the *Aranda* TCPA case settled for $76 million. $56 million went to the class of over one million people. The plaintiffs' attorneys were awarded $15.3 million in attorneys' fees. (*Aranda v. Caribbean Cruise Lines*, 179 F. Supp. 3d 817 (N.D. Ill. 2016).)

So, let's conduct a thorough investigation into "just the facts." In the parlance of the episode names, we can dub this the "Big Phone Call (Episode # 12)." [*BTW, there were 276 original TV series episodes of "Dragnet" from 1951-59.*]

The "Big Trio" (*Episode #19*): Actual authority, apparent authority, and ratification

In 2013, the FCC clarified that the "TCPA contemplates that a seller may be vicariously liable under agency principles for violations of section 227(b)." (*In re DISH Network, LLC,* 28 F.C.C. Rcd. 6574, 6590 n.124 (2013); *see also Thomas v. Taco Bell Corp.*, 582 Fed. Appx. 678, 679 (9th Cir. 2014).)

The FCC further instructed that courts should turn to the federal common law of agency, and that vicarious liability under the TCPA could be established by "a broad range of agency principles, including not only formal agency, but also principles of apparent authority and ratification." (*In re DISH Network, LLC, 228 F.C.C. Rcd. at 6584*; *see also Gomez*

v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014), *aff'd*, 136 S. Ct. 663 (2016), *as revised* (02/09/16).) In addition to agency, a joint venture enterprise with companies acting as *alter egos* for one another might also support a claim.

To satisfy the apparent authority concept, the calling party (as the supposed agent) must reasonably believe it is within their discretion to breach the TCPA by autodialing or leaving recorded sales messages. The Restatement (Third) of Agency Section 8.09 says this: "An agent's interpretation of a principal's manifestations and understanding of a principal's objectives must be reasonable."

The reasonableness of a delegated freedom to violate the TCPA is hard to establish when most contracts by which third parties are hired to communicate with consumers make clear that marketing must be in accordance with all applicable laws and regulations.

Ratification of illegal TCPA violations is possible, but only if the party making the communications with the consumer is an agent of the principal. (*Batzel v. Smith*, 333 F. 3d 1018 (9th Cir. 2003) ("Although a principal is liable when it ratifies an originally unauthorized tort, the principal-agent relationship is still a requisite, and ratification can have no meaning without it."). Ratification can be a question for the jury if the evidence shows acceptance of benefits of the texting/calling practices of separate parties. (*See Aranda*)

"The Big Lay-Out" (*Episode #37*): How do you plead?

The FCC in *Dish Network*, 28 F.C.C. Rcd. at 6592, provided five examples of the type of evidence that "may demonstrate" vicarious liability:

- That the seller allows the outside sales entity access to information and systems normally controlled by the seller such as pricing and customer information.
- That the outside sales entity had the ability to enter consumer information into seller's systems.
- Authorized use of the seller's intellectual property and trademarks.
- That the seller approved, wrote, or reviewed telemarketing scripts.
- That the seller knew or reasonably should have known that the telemarketer was violating the TCPA.

The following 10 factors [*Id.* at 504 (citing Restatement (Second) Of Agency § 220(2) (1958)] are relevant to the determination of whether an individual providing services for a principal is an agent or instead is an independent contractor:

- The control exerted by the employer.
- Whether the one employed is engaged in a distinct occupation.
- Whether the work is normally done under the supervision of an employer.
- The skill required.
- Whether the employer supplies tools and instrumentalities [and the place of work].
- The length of time employed.
- Whether payment is by time or by the job.
- Whether the work is in the regular business of the employer,
- The subjective intent of the parties.
- Whether the employer is or is not in business.

These factors are not exhaustive, but they guide the agency analysis.

Of no relevance at all to the vicarious liability analysis is whether the TCPA infraction is admitted or disputed. It also does not matter if the TCPA communication issue is regarding an attempt to collect on a debt — *i.e.*, no strict liability for the TCPA actions of debt collectors.

To be sure, mere conclusory allegations of agency are insufficient to state a claim. Specific facts regarding agency must be offered which support a reasonable inference of agency. (*Henderson v. United Student Aid Funds, Inc.*, No. 13-1845, 2017 WL 766548 (S.D. Cal. 02/28/17).) This means that the complaint has to spell-out how the agent acted on the principal's behalf, subject to the principal's control [of the manner and means and not just the outcome] and with the authority to act in order to state a claim.

If the complaint on its face makes clear that some other entity other than the alleged agent has the right to control whether the communication was sent, to whom sent, and the content, then a dismissal of a vicarious liability claim is appropriate without leave to amend the pleadings because such an amendment would be futile and contradicted by the prior pleading. (*Meeks v. Buffalo Wild Wings, & Yelp*, No. 17-7129, 2018 WL 1524067 (N.D. Cal. 03/28/18).)

"The Big Bounce" (*Episode #137*): Motion to dismiss cases

Motions to dismiss are infrequently granted, but recent success has been achieved for defendants in vicarious liability cases.

Meeks is the most recent of four cases to grant defendants' motion to dismiss a putative TCPA claim of vicarious liability. The others are *Kern v. VIP*

Travel Services, et al., No. 16-8, 2017 WL 1905868 (W.D. Mich. 05/10/17); *Trenz v. Sirius XM and Toyota*, No. 15-44, 2015 WL 11658715 (S.D. Cal. 07/13/15); and *Seri v. CrossCountry Mortgage, Inc., et al.*, No. 16-1214, 2016 WL 5405257 (N.D. Ohio 09/28/16).)

The plaintiff in *Meeks* attempted a claim against Buffalo Wild Wings restaurant, against the on-line restaurant reference source Yelp, and against a web-based application NoWait, Inc. which allows customers to sign up for text notification when their table reservation is ready rather than stand in line. Customers provide their phone numbers to the restaurant's hostess at check-in.

The allegations indicated that Wild Wings controlled whether, when, and to whom to send the text messages — not Yelp or NoWait — and the content was also in the restaurant's control. These allegations were insufficient to support a reasonable inference of an agency relationship with Yelp.

Leave to amend the complaint was also denied as to Yelp because amendment would be futile. The rejected complaint had already established that Yelp did not initiate the text messages and no entity acted in any way on Yelp's behalf. The court declined to rule on the Wild Wings motions to dismiss because the case was transferred to another venue for further proceedings.

In *Kerns*, Judge Aleff in the Western District of Michigan dismissed a vicarious liability claim and also denied leave to amend as futile. The claim was that Secrets Resorts was liable for telemarketing calls made by travel agencies to give away "free" vacations at time-share properties. The allegations were inadequate for lack of details how Secrets Resorts either had the right to control calls or gave actual authority to the travel agencies to call customers via improper means.

In *Trenz*, a vicarious liability claim against Toyota was dismissed without prejudice to re-filing. Judge Tony Battaglia of the Southern District of California held there were insufficient allegations that Toyota ratified the telemarketing calls made by SiriusXM radio attempting to sell satellite radio subscriptions. There were no allegations that Toyota initiated the calls or attempted to market Toyota products. The allegations found wanting were deemed mere labels and conclusions which failed to plausibly describe a TCPA infraction.

In *Seri*, the plaintiff alleged that defendant Direct Source — a telemarketing vendor — made unsolicited calls to the plaintiff's cellular telephone using an ATDS and relying on a website for leads. CrossCountry Mortgage regularly had third-party telemarketers make calls but had an "extensive relationship" with Direct Source. The Court noted that the plaintiff did not describe with any clarity what CrossCountry's role was and what actions it took. Plaintiff did not allege that any of the persons with whom he spoke was a CrossCountry operator or telemarketer, or identified themselves as such, that the telephone numbers from which the calls were made were associated with CrossCountry, or even that CrossCountry products or services were offered for sale during any of the phone calls.

The plaintiff did not plead any facts suggesting that CrossCountry received leads or generated any sales from the website — which might have been an act ratifying Direct Source's conduct — or how the site might be related to any of the telephone calls he allegedly received. The plaintiff also failed to allege that his personal information was passed between defendants, that Direct Source had access to otherwise confidential CrossCountry information, or that any of the alleged phone calls included any reference to CrossCountry's name, products or trademarks. This "stopped short of the line between possibility and plausibility" required to survive a motion to dismiss under the federal pleading standard.

There are a few lessons to be learned by the vicarious liability cases disposed of on motions to dismiss. Three are worthy of note:

- A plaintiff which has inadequately pled vicarious liability under the TCPA may or may not get a chance to file an amended complaint. In *Trenz v. Sirius*, the door was left open for an amended complaint. But, in *Meeks* as well as *Kern*, the claims were dismissed and an amendment was disallowed as futile. The defective complaints had clearly staked out a legal position which was inconsistent with an amendment.
- If the TCPA vicarious liability allegations are centered solely on a mutually beneficial contractual relationship between a principal and the calling agent, then this, by itself, is probably not enough to state a claim. As in *Trenz v. Sirius,* without any allegations that Toyota placed TCPA-offending calls or sought to market any of its products during the communications, the supposed agency relationship may be deemed implausible.
- A vicarious liability TCPA claim must allege that the calling or texting party, which is supposed to be the agent of the alleged principal, itself committed a TCPA violation by making the text or calls. (*See Wick v. Twilio Inc.*, No. 16-914, 2017 WL 2964855 (W.D. Wash. 07/12/17).)

For example, if texts were initiated by cloud-based software after a plaintiff visited a website and ordered free goods, then this is not "telemarketing"; instead, it is responding to a consumer initiated communication.

The "Big Missing" (*Black-and-White Episode #93*): Summary Judgment

While vicarious liability is a notorious fact question, sometimes the issue is clear cut. The 4th U.S. Circuit Court of Appeals only recently affirmed the grant of summary judgment in *Hodgin v. UTC Fire & Security Americas*, No. 17-1222, 2018 WL 1308605 (4th Cir. 03/13/18). Marketers of various in-home security systems were not controlled by the manufacturers sufficient to trigger agency liability.

There are at least seven other cases where summary judgment has been granted to defendants on TCPA vicarious liability claims:

1. *Mais v. Gulf Coast Collection Bureau, Inc.*, 944 F. Supp. 2d 1226 (S.D. Fla. 2013) [No fact question presented for a radiology service provider (Fla. United) or its owner/hospital holding company (Sheridan) for the admitted use of an ATDS by a debt collection agency to attempt to collect a medical bill from plaintiff.].
2. *Strauss v. CBE Group, Inc.*, 173 F. Supp. 3d 1302 (S.D. Fla. 2016) (No agency between cable service provider Verizon and debt collector CBE Group — even though there were admitted calls made by CBE to the plaintiff which violated the TCPA and calls were made in an effort to collect on a debt incurred to Verizon, and even though Verizon exercised some controls over CBE's collection activities and may have been a part of the creation of the call transcripts read by CBE collectors, this was insufficient manner and means control.).
3. *Jones v. Royal Admin. Servs.*, 866 F. 3d 1100 (9th Cir. 2017) [No actual agency where an extended vehicle warranty issuer (Royal) sold only via a network of 20 telemarketing firms, one of which was AAAP, for its calls to cell phones when numbers were listed on the DNC registry. Applying the 10-factor test for agency, the court determined AAAP was an independent contractor which itself decided who to call, when to call them, what numbers to call and the call content.].
4. *Kristensen v. Credit Payment Servs.*, 879 F.3d 1010 (9th Cir. 2018) [No ratification — three payday lenders and two marketing companies — one in contract with the lenders (Leadpile) and another (ClickMedia) in contract with a non-party, lead publisher (AC Referrals), which admittedly sent TCPA-violating-text messages to consumers to try and sell them payday loans (which if closed resulted in a partial fee paid for the lead), the text messages were merely the indirect result of marketing campaigns not controlled by the payday lenders — who did not even know of the existence of AC Referrals.].
5. *Henderson v. United Student Aid Funds, Inc.*, No. 13-1845, 2017 WL 766548 (S.D. Cal. 02/27/17) [Student lender/creditor (USAF) not vicariously liable to consumer who was indisputably robo-called by its loan servicer's (Navient Solutions Inc.'s) contracted-out collection company. NSI was an independent contractor and USAF had insufficient control over the manner and means by which NSI oversaw these collector's activities. The fact that USAF periodically audited NSI's performance or loan servicing and required quarterly and annual reporting by NSI on the efficiency of the collectors was merely control over the outcomes of NSI's work- not the manner and means of the NSI-hired-collectors. There was no evidence that USAF's audits specifically monitored for the TCPA at all and only NSI had the ability to change the collectors' conduct, to take direct adverse action against them, or to handle consumer complaints against collectors. The *Aranda* case was distinguished in a footnote.].
6. *In re Monitronics Int'l, Inc.*, 223 F. Supp. 3d 514 (N.D.W.Va. 2016) (Plaintiffs could not demonstrate that home security manufacturer exercised sufficient control over the authorized dealers to present an issue and there was no evidence that the manufacturer turned a blind eye.)
7. *Makaron v. GE Security Mfg. Co.*, No. 14-1274, 2015 WL 3526253 (C.D. Cal. 05/18/15) [Rejecting all three concepts; A security equipment manufacturing company (UTCFSA) sold its equipment to the public through a network of licensed/authorized dealers. One such dealer was Security One Alarm Systems, which controlled its own marketing activities, set its own prices, and promised it would comply with all laws in their marketing and sale of equipment; and where UTCFSA had no idea if or any records indicating whether the dealer was the source of any calls to the plaintiff.].

There is also a pending motion [*as of presstime*], which has been briefed in another case, where Wal-Mart seeks summary judgment, but the court has not yet ruled. (*Cook v. Palmer Reifler & Assoc., et al.*, No. 16-cv-00673 (M.D. Fla., motion for summary judgment 02/22/18) (alleging that Wal-Mart contracted with a law firm to attempt to collect judgments against people who have been caught by stores for shoplifting and the law firm made calls to consumers).)

The "Big Break" (Episode #33): Summary judgement as a matter of law

On the opposite side of the equation, it would be nearly impossible for a plaintiff to win summary judgment where vicarious liability is satisfied as a matter of law. There have been at least three recent cases denying plaintiffs efforts to have a court declare a TCPA defendant liable via pretrial motion: *The Siding & Insulation Co. v. Combined Ins. Grp, Ltd.*, 2014 WL 1577465 (N.D. Ohio 04/17/14) (blast fax case where insurance company advertiser claimed it only authorized 50 faxes by B2B but B2B sent more than 7,000); *Creative Montessori Learning Ctr. v. Ashford Gear, LLC*, 2014 WL 865963 (N.D. Ill. 03/03/14) (blast fax case where defendant presented evidence creating a fact question as to the scope of B2B's agency to send ads); *Imhoff Inv., LLC v. SamMichaels, Inc.*, 2014 WL 172234 (E.D. Mich. 01/15/14) (blast fax case where SamMichaels utilized B2B to advertise its tux rentals. Fact dispute because SamMichaels contended it never authorized the faxes and did not control the manner and means).

The "Big War" (Episode #226): Unavoidable trial

While not always in the Los Angeles state courts where "Dragnet" episodes ended up, but sometimes so, TCPA vicarious liability cases are occasionally destined for a jury.

Indeed, summary judgment was denied in *Wick v. Twilio* where the alleged agent developed a cloud-based system for text communications which was programmed to dial and send offending text messages. If the company determined the content of the messages sent, the order and timing of the messages, the numbers sending the messages [spoofing] and promoted the systems' ability to spam, then vicarious liable can result.

Aranda is another summary judgment denial case. Where alter-ego companies allegedly coordinated in a scheme to place robocalls to consumers disguised as political opinion surveys and gave away "free" cruise line trips (and upgrades if they signed up for sales pitches to buy timeshare properties), the joint venture/ratification issue was deemed a fact question for a jury.

The "Big Shakedown" (Episode #29): Class Certification

The Rule 23 hurdles for class certification do not appear to be very high or uniquely affected by vicarious liability issues. In several cases — *Creative Montessori*, *Aranda*, and *Kristensen* — courts certified classes. The proposed definitions merely stated that the class included calls either made by or for the benefit of the maker and the party to be held vicariously liable.

Of note to class certification, the typical vicarious liability fact pattern does not include an effort by the consumer-communicating-agent to obtain consent in advance for the call. Therefore, the individualized inquiry concerning such consents (or revocations) is usually not a Rule 23 deterrent.

"The Big Lessons" (Episode #196)

Avoiding the TCPA dragnet can be difficult. Early motions to dismiss are risky because amended complaints are usually allowed. And, the *Spokeo*-effect in TCPA cases has not increased motion-to-dismiss frequency based on the absence of an injury in fact.

As Judge Matthew Kennelly ruled in the *Aranda* case, the TCPA "directly forbids activities that by their nature infringe the privacy-related interests that Congress sought to protect." And while summary judgment motions have been more helpful for defendants, they are most effective if they occur before class certification is decided.

This is not to say that defendants have no means of escape. Always remember that if there is no agency relationship, then there can be no ratification. Another big lesson is that agency law is apolitical. Several historically unpopular defendants have been determined to not be subject to TCPA vicarious liability as a matter of law — including payday lenders, student loan servicers, collection law firms, and cable television companies.

Also, a relatively high degree of contractual control is permitted by companies over the end results of collection or marketing efforts of companies to which delegation is made. Periodic audits, regular reporting of results, some degree of training and business coaching, and even some authorization of practices might not trigger a fact question. The key is that the manner and means of communicating with the consumers is not controlled.

Finally, the presence of a contractual promise by the alleged agent to observe all applicable laws and regulations has often been cited as an important factor militating against a vicarious liability fact issue.

So, there you have it, Sgt. Joe Friday style: "Just the facts."