FCC Rules Sellers May Be Vicariously Liable for Third-Party Telemarketers' Violations of Telephone Consumer Protection Act

The Federal Communications Commission ("FCC") recently declared that sellers of products and services can be held vicariously liable for actions of third party telemarketers that violate the Telephone Consumer Protection Act of 1991 ("TCPA"). In an order released on May 9, 2013, the FCC opined that, if a seller authorizes an independent contractor to market its goods or services, and the contractor uses prerecorded "robocalls" or calls consumers listed on the national "do-not-call" registry, the seller can be held liable for the independent contractor's actions even if the seller does not exercise direct supervision over those telemarketing activities. This ruling is significant in potentially broadening the exposure that producers of goods and services may have to class-action litigation and other enforcement actions when third-party telemarketers violate the TCPA.

Additionally, the ruling echoes recent regulatory trends making organizations legally responsible for the actions of third-party service providers that they select or have the authority to supervise if the provider violates consumer privacy. Examples include the Red Flags Rule issued last month by the Securities and Exchange Commission and the Commodity Futures Trading Commission, as well as the Federal Trade Commission's modifications to the Children's Online Privacy Protection Act at the end of last year.

The FCC order arose out of two federal court actions, each alleging violations of sections 227(b) and 227(c) of the TCPA. Under section 227(b), it is unlawful for any person to "initiate any telephone call to any residential telephone line using an artificial or prerecorded voice without the express consent of the called party." These prerecorded marketing messages are commonly known as "robocalls." Section 227(c) authorizes the FCC to create a national "do-not-call" registry that consumers can use to put telemarketers on notice that they do not wish to receive telephone solicitations, and FCC regulations make clear that initiating a solicitation to an individual on the registry is not permitted. The TCPA states that these provisions may be enforced by the FCC and the state Attorneys General, and consumers are also permitted to bring a private action for damages and injunctive relief premised on a single violation of section 227(b) or more than one violation of section 227(c) "by or on behalf of" a company within a 12-month period.

In the first of the federal court actions related to the FCC order – *Charvat v. EchoStar Satellite, LLC* – Phillip Charvat filed suit in federal district court in Ohio, asserting that telemarketers for Echostar had made numerous robocalls and live calls in violation of the TCPA. EchoStar, which delivers DISH Network ("DISH") brand programming, countered that it could not be vicariously liable for the telemarketers' actions because the telemarketers were independent contractors, not agents, under Ohio's state-law definition of agency. While the district court found in EchoStar's favor at the summary judgment stage, on appeal, the Sixth Circuit referred the action to the FCC to determine when and how sellers could be vicariously liable for telemarketers' actions in the TCPA context.

Meanwhile, the United States had filed suit under the TCPA against DISH in an Illinois federal district court on behalf of the Federal Trade Commission and the Attorneys General of California, Illinois, North Carolina, and Ohio. As in *Charvat*, DISH's telemarketers had marketed DISH using prerecorded calls and calls to numbers on the "do-not-call" registry. The district court stayed the matter in view of the Sixth Circuit's referral in *Charvat*, and the court directed the parties to file an administrative complaint with the FCC. Accordingly, in early 2011, all parties involved in both actions filed petitions seeking FCC rulings

interpreting the prerecorded and do-not-call provisions of the TCPA to determine whether they create liability for a seller as a result of telemarketing calls made by third-party retailers.

The FCC focused on construing sections 227(b) (the prohibition on prerecorded messages) and 227(c) (concerning the "do-not-call" registry) and concluded that sellers could be held vicariously liable for telemarketers' unlawful calls under federal common law principles of agency. According to the FCC, vicarious liability could derive from (1) a formal agency relationship, in which the seller manifests assent to a telemarketer that it should act on its behalf and subject to its control; (2) principles of apparent authority, for example, when the consumer reasonably believes because of some manifestation by the seller that the telemarketer has authority to act on the seller's behalf; or (3) principles of ratification, for example, when the seller knowingly accepts the benefits of the telemarketer's unlawful activities.

Notably, the order leaves open the possibility that this liability standard will be further expanded in the future, at least for "do-not-call" violations. The FCC order observes that only section 227(c) empowers private citizens to sue for violations made "on behalf of" a company. In this instance, the FCC declined to treat sections 227(b) and 227(c) differently because of this textual variance, noting that creating such a distinction would be inappropriate for a declaratory ruling. However, the FCC noted that future FCC interpretations and regulations could broaden the liability standard for section 227(c) on the basis of the "on behalf of" language.

Businesses that have telemarketing relationships should review their current policies in light of the FCC's order. The order states that the following factors may be probative of an agency relationship and may expose the seller to vicarious liability for a telemarketer's unlawful actions:

- the telemarketer's level of access to a seller's information and systems;
- the telemarketer's ability to enter data into the seller's systems;
- the telemarketer's authority to use the seller's trade name and trademark or service mark;
- any seller review of the telemarketer's scripts.

According to the order, a seller will also be vicariously liable if it has authorized the telemarketer to act on its behalf and knows or reasonably should have known that the telemarketer was violating the TCPA and failed to intervene. On the other hand, the order suggests that sellers can avoid vicarious liability by exercising reasonable diligence in selecting and monitoring telemarketers and by including indemnification clauses in their contracts with telemarketing entities.

For more information regarding the FCC's decision and its potential impact, please contact a member of our leading privacy and data security team, including **Doug Meal**, **Mark Szpak**, **Jim DeGraw**, and **David McIntosh**.