CLIENT ALERTS & INSIGHTS

Direct Energy Defeats TCPA Claim: No Liability for Unknown Telemarketer's Calls

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With all the talk of the Supreme Court's decision in AAPC, it's upcoming decision in Facebook, and all the other currently hot items-of-the-year in TCPA litigation (Creasy, etc.), it can be easy to skip past decisions that serve as a reminder that fundamentals matters. Like a plaintiff actually figuring out who was calling him, as shown in Worsham v. Direct Energy Servs., No. SAG-20-00193, 2021 U.S. Dist. LEXIS 46837 (D. Md. March 12, 2021).

The plaintiff, Michael Worsham, placed both his cell and residential landline telephone numbers on the national DNC Registry. Worsham received almost 30 calls on his telephone numbers, which he alleged were marketing the energy services of Direct Energy. Like many companies, Direct Energy did not directly make the calls, but instead used a variety of third-party, independent telemarketing companies.

Worsham filed suit against Direct Energy, seeking to hold it liable for the third party's allegedly unlawful telemarketing calls under the TCPA. Direct Energy investigated, but was not able to identify what vendor (if any) had made the calls. Worsham issued subpoenas to Direct Energy's vendors, but ultimately was also unable to identify the vendors allegedly responsible for the calls. Upon cross-motions, the district court entered summary judgment in favor of Direct Energy.

First, the court concluded that because Worsham did not answer many of the at-issue calls, he could not prove that the calls were made on behalf of Direct Energy. This is an important point to keep in mind for defendants-many telemarketing companies market products on behalf of various sellers. Even if an independent telemarketer is marketing one seller's product on a particular call, it cannot be presumed that other calls, even if made by the same telemarketer, were attempting to sell the same seller's product or service.

There were, however, some calls that Worsham answered in which the callers allegedly stated they were calling on behalf of Direct Energy. Worsham alleged that these calls also violated the TCPA because they were made using an "automatic telephone dialing system" (ATDS) and were solicitation calls made to his telephone numbers on the DNC Registry.

The court held that because Worsham could not identify who made the actual calls, he could not identify what type of dialing equipment was used, and therefore could not prove that the calls were made using an ATDS. This is another important point for TCPA defendants to keep in mind. Many courts allow generic allegations of a plaintiff hearing a "pause" or "click" as sufficient to allege the use as an ATDS at the pleading stage (i.e., survive a motion to dismiss). However, that is not enough to survive summary judgment. The court succinctly concluded "without knowing who made the eleven calls, he has no way of establishing how those calls were dialed," and entered summary judgment in Direct Energy's favor.

Finally, regarding the DNC claim, the court held that Worsham failed to prove that Direct Energy could be held liable for the unknown telemarketer's calls. While a seller may be held liable for a telemarketer's TCPA violations under theories of vicarious liability, any type of vicarious liability ultimately requires proof linking the seller to the actual telemarketer.

Worsham advanced multiple "throw 'em at the wall" theories of vicarious liability. Importantly, the district court noted that the mere fact that a caller said it was allegedly calling on behalf of Direct Energy was not sufficient to establish vicarious liability. Beyond that, the court also dissected Worsham's other theories as well, but here's what it boils down to: because Worsham could not identify who actually called him, he could not prove the required elements for vicarious liability (under any theory) between the unknown caller(s) and Direct Energy.

In a classic TCPA-plaintiff move, Worsham tried to blame that lack of evidence on Direct Energy, essentially trying to shift the burden onto Direct Energy to identify the telemarketer and disprove vicarious liability. Because Direct Energy complied with all of its discovery obligations, the district court squarely rejected this argument, entering summary judgment in Direct Energy's favor: "Direct Energy complied with its discovery obligations, and the fact that it did not uncover evidence supportive of Worsham's claims does not somehow create vicarious liability on its part."

While the result in *Worsham* seems basic at first glance, it is an important decision. Despite the seemingly obvious result, courts can *and have* gotten distracted by spurious vicarious liability noise even when the actual identity of the callers remains a mystery. And a lot of times, defendants don't help themselves by focusing too much on the "hot" defense issues instead of keeping the focus on the threshold elements of the plaintiff's claims. Focus on the fundamentals, comply with discovery obligations, and keep the plaintiffs' feet to the fire on their burden of proof.

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