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Practice Groups:

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Complex Commercial Litigation and Disputes

Court Rejects TCPA Claims Based on Theory of Third-Party Liability

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The U.S. District Court for the Northern District of West Virginia recently granted summary judgment for the defendant alarm manufacturers in *In re Monitronics International, Inc. Telephone Consumer Protection Act Litigation* ("*Monitronics*").[1] In doing so, the *Monitronics* court rejected Telephone Consumer Protection Act ("TCPA")[2] claims based on alleged liability for acts of vendors, distributors, or other third parties. The court also expressly overruled its own earlier, contrary opinion rendered in *Mey v. Monitronics International, Inc.*,[3] which matter was consolidated into *Monitronics* as part of a multidistrict litigation ("MDL"). Thus, the court joined a growing number of jurisdictions that have questioned the ability of plaintiffs to prove vicarious liability in connection with TCPA claims.

Background

The *Monitronics* MDL consists of thirty TCPA cases that name as defendants alarm-system manufacturers, alarm-system monitoring companies, and entities that sell alarm systems to consumers. Plaintiffs alleged that they received autodialed calls on their cell phones for which they had not provided their prior express consent and that they were called in violation of their registration on the national do-not-call registry. Plaintiffs did not allege that the manufacturers placed any calls themselves. Rather, plaintiffs asserted that the system sellers made calls on behalf of the manufacturers, and thus, that the manufacturers were vicariously liable for the calls.[4]

The *Monitronics* Decision

In ruling on plaintiffs' theory, the court first rejected plaintiffs' argument that questions of vicarious liability, including whether an agency relationship exists, are not susceptible to resolution at summary judgment. Instead, the court ruled that it could adjudicate such questions at summary judgment "where the evidence would not permit a reasonably jury to find for the nonmoving party."[5]

Next, the court ruled that while the Federal Communications Commission ("FCC") has determined that vicarious liability is available under the TCPA (commensurate with "federal common law principles of agency"), such liability is narrowly drawn.[6] The court held that, in making its determination, it must assess whether the manufacturer defendants controlled

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[1] MDL No. 2493 (J.P.M.L.), Case No. 1:13-md-02493-JPB-JES, 2016 WL 7413495 (N.D. W. Va. Dec. 22, 2016).

[2] 47 U.S.C. § 227.

[3] 959 F. Supp. 2d 927 (N.D. W. Va. 2013). Different judges rendered the 2013 *Mey* decision and the 2016 *Monitronics* decision.

[4] *Monitronics*, 2016 WL 7413495, at *6.

[5] *Id.* at *5 (citing Spitz v. Proven Winners N.A., LLC, 759 F.3d 724, 731 (7th Cir. 2014)).

[6] *Id.* at *2.

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"the manner and means of the solicitation campaign that was conducted" by the sellers.[7] In doing so, the court concluded that the manufacturers were not vicariously liable for calls placed by vendors.

Specifically, the court found that even where the manufacturers permitted vendors to represent themselves as "authorized representatives," provided telemarketing scripts, and purportedly failed to move "swiftly enough" to stop the vendors' unlawful calling practices, this was not sufficient to establish the requisite amount of control to give rise to an agency relationship between the manufacturers and the vendors.[8] Nor would a defendant's approval of a purported agent's actions or issuance of directives regarding compliance with a contract between the defendant and the vendor create an agency relationship where the vendor retains discretion regarding the manner in which it complies with the directives.[9]

Impact

In reaching its conclusion, the *Monitronics* court expressly rejected a contrary ruling that it had issued through a predecessor judge in *Mey*, a case subsequently made part of the *Monitronics* MDL. The plaintiffs' bar had relied on *Mey* in support of vicarious liability claims in TCPA actions against manufacturers and other defendants who did not directly place telephone calls. Manufacturers and companies working with vendors, third-party distributors, or other parties who might use trademarked or licensed names may want to consider the factors and reasoning discussed in the *Monitronics* decision in assessing potential exposure to pending TCPA vicarious liability claims. In joining courts rejecting such claims at summary judgment,[10] the *Monitronics* court provided guidance for potential disposition of TCPA claims at a relatively early stage of the litigation. At the same time, businesses must remain mindful that despite the recent trend, the FCC's rulings provide a legal basis for vicarious liability under the TCPA when a plaintiff can demonstrate sufficient evidence of the existence of an agency relationship.

[7] *Id.* at *5 (citing Mey v. Pinnacle Security, LLC, 2012 WL 4009718 (N.D. W. Va. Sept. 12, 2012)).

[8] *Id.*

[9] *Id.* at *6 (citing Wood v. Shell Oil Co., 495 So. 2d 1034, 1037 (Ala. 1986)).

[10] *See, e.g.*, Petri v. Mercy Health, No. 4:15 CV 1296 CDP, 2016 WL 7048893, at *1 (E.D. Mo. Dec. 5, 2016); Klein v. Just Energy Grp., Inc., No. CV 14-1050, 2016 WL 3539137, at *16 (W.D. Pa. June 29, 2016); Soulliere v. Cent. Fla. Inv., Inc., No. 8:13-CV-2860-T-27AEP, 2015 WL 1311046, at *7 (M.D. Fla. Mar. 24, 2015); Hurst v. Mauger, No. 11 C 8400, 2013 WL 1686842, at *6 (N.D. Ill. Apr. 16, 2013).

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