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Fourth Circuit finds manufacturers not vicariously liable for retailers' TCPA violations

by Jeff Fisher

Takeaway: A recent Fourth Circuit decision finding that UTC and Honeywell, manufacturers of home-security systems, could not be held vicariously liable for calls by downstream retailers in violation of the Telephone Consumer Protection Act ("TCPA"), shows that manufacturers can avoid TCPA liability by implementing common sense safeguards. The Fourth Circuit rejected the class plaintiffs' attempt to pin TCPA liability on UTC and Honeywell simply because companies licensed to use their trademarks and sell their products violated the TCPA.

In *Hodgin v. UTC Fire & Sec. Americas Corp.*, No. 17-1222, 2018 WL 1308605, at *1 (4th Cir. Mar. 14, 2018), the Fourth Circuit upheld the district court's grant of summary judgment in favor of UTC Fire & Security Americas Corporation, Inc. ("UTC") and Honeywell International, Inc. ("Honeywell") on claims that UTC and Honeywell were vicariously liable for TCPA violations committed by telemarketers selling their home-security products. The court agreed there was no evidence that either UTC or Honeywell had ratified the illegal telemarketing practices – either by failing to object or retaining the financial benefits of the allegedly illegal call campaigns.

Hodgin was one of seven class action lawsuits consolidated by the Judicial Panel on Multidistrict Litigation in the Northern District of West Virginia, and which alleged that home-security retailers violated the TCPA by making illegal telemarketing calls. The class plaintiffs further alleged that UTC and Honeywell, manufacturers of the home-security systems, should be held vicariously liable for calls made by Versatile Marketing Solutions, Inc. ("VMS") and ISI Alarms NC, Inc. ("ISI"), retailers that (respectively) purchased UTC and Honeywell manufactured home-security systems from third-party distributors and engaged in illegal telemarketing to sell the systems to consumers. VMS and ISI had both entered into agreements with the manufacturers that permitted the retailers to use UTC/Honeywell's trademarks and logos, but also required the retailers to comply with applicable telemarketing laws and also barred the retailers from holding themselves out as agents or employees of UTC/Honeywell.

Both UTC and Honeywell had received notice that the retailers had engaged in illegal telemarketing practices, including multiple complaints from individual consumers. Both manufacturers followed-up with the retailers, eventually terminating their relationships with them. For example, whenever UTC received a complaint, it would investigate the complaint, inform VMS of the grievance, and remind VMS that it was contractually obligated to comply with applicable telemarketing laws. When UTC continued to receive complaints after repeated warnings, it terminated its relationship with VMS.

The district court had found that UTC/Honeywell could not be held liable on any of the three agency (vicarious liability) theories: (1) actual authority, (2) apparent authority, or (3) ratification. On appeal, the plaintiffs pursued only one theory, arguing that a material issue of fact existed as to their ratification theory. In particular, plaintiffs argued that UTC/Honeywell had ratified the retailers' TCPA violations by failing to repudiate their telemarketing practices after receiving notice, and by accepting the financial benefits of the illegal telemarketing.

The Fourth Circuit ruled that the ratification theory was not supported by the evidence. First, the court observed that the manufacturers' follow-up efforts – including investigating the complaints, reminding the retailers of their legal obligations, and eventually terminating the retailer agreements – were sufficient to show repudiation. Second, the court found that the mere fact that UTC/Honeywell had financially benefitted (by selling home-security products to the telemarketers) was insufficient to establish ratification. Plaintiffs had failed to offer specific evidence that the *illegal* telemarketing scheme had increased sales of the home-security products. This ruling appears to limit the oftentimes amorphous concept of ratification. The Fourth Circuit thus affirmed the district court's grant of summary judgment on the vicarious liability claims.

Practice Pointer: *Hodgin* is good news for upstream manufacturers and distributors concerned about TCPA liability arising from the conduct of loosely-affiliated third-party dealers, retailers, resellers, and marketers, over whom they typically have little control. *Hodgin* shows that, so long as manufacturers and distributors (1) include contractual provisions that make clear downstream sellers must abide by the TCPA; (2) take reasonable steps to investigate and address any complaints about TCPA violations; and (3) terminate a relationship if complaints are not addressed, they should be able to avoid TCPA liability.