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Good Loss: Ninth Circuit Court of Appeal Confirms That Creditors Are Not Per Se Liable for Calls Placed by Collectors– but Rules Against Creditor Anyway

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TCPAWorld has more than its fair share of raging debates: the definition of ATDS, whether contractual consent can be revoked, etc.

Among the most frustrating – from my perspective – is the question of whether creditors might be automatically liable for TCPA violations by third-party collectors servicing debts even though sellers are not subject to such *per se* liability when telemarketers make calls on their behalf.

Huh, you say? Let me break it down.

Back in 2008, the FCC ruled that calls made by debt collectors would be treated as if they were made by the creditors for purposes of TCPA liability. See *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C. Rcd. 559, 565 (2008) ("[c]alls placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call.") The language of the order is vague, and it was always unclear whether the Commission was just using loose language to describe the general vicarious liability paradigm applicable to federal statutes or actually intended to create some sort of substantive rule that creditors must always answer for the sins of their collectors.

In 2013, however, the FCC issued a very clear ruling finding that vicarious liability principles apply to the TCPA in the context of telemarketing calls. See *In re Joint Petition Filed by Dish Network, LLC*, 28 F.C.C. Rcd. 6574, 6574 (2013). This means that a seller cannot be held liable for a TCPA violation by a telemarketer in the absence of agency, apparent authority or ratification.

Since 2013, district courts have split as to the impact of the 2013 vicarious liability ruling on the oddball language from 2008 regarding creditor liability for calls by servicers. Some courts continued to find that creditors remained per se liable. But many others disagreed holding that the 2013 ruling applied in all contexts, not just to telemarketing. No court of appeal had considered the issue, however.

Until now.

On Friday, the Ninth Circuit Court of Appeal weighed in and answered the question directly – creditors are not per se liable for TCPA violations by debt collectors but can be held liable under basic vicarious liability principles. See *Shyriaa Henderson v. United Student Aid Funds, Inc*., No. 17-55373 (9th Cir. March 22, 2019). That's nice to hear.

In *Henderson*, Plaintiff sought to hold the Defendant, USA Funds – the owner of billions in federally backed debt – liable for calls made by down-stream debt collectors that had contracted with USA Funds' servicer to collect on delinquent student loan debt. These collectors were (allegedly) naughty miscreants who were using autodialers to call skip traced phone numbers. Not a good idea in TCPAWorld.

USA Funds earned summary judgment below, however, with the district court finding that a passive creditor relying on a servicer to hire collectors could not possibly be liable for TCPA violations by those collectors on a vicarious liability theory. The Plaintiff appealed, arguing: (i) sure they can be; and (ii) Defendant is automatically liable for those calls under the old 2008 FCC ruling anyway.

The Ninth Circuit agreed that the Defendant might be held vicariously liable – more on that in a second – but disagreed that creditors are always liable for calls by collectors pursuant to the FCC's 2008 Order. To the contrary, the Ninth Circuit held that the 2013 ruling had abrogated the language from 2008 and that the Supreme Court's subsequent holding in *Gomez v. Campbell-Ewald Co*. foreclosed any such reliance on the 2008 FCC Order (which is a little odd since *Gomez* was a telemarketing case.) So under *Henderson* a creditor can only be held liable for TCPA violations by a collector under vicarious liability principles after all.

While that's great news, it wasn't great enough to save USA Funds from a reversal of fortune. The Court goes on to analyze the evidence presented at the summary judgment stage and concludes that a jury could have found USA Funds liable on a ratification theory.

And here's the second critical piece of the *Henderson* ruling – the Ninth Circuit disagrees with case law holding that an agency relationship must exist in order for liability via ratification to attach. Rather, in the Ninth Circuit's view, where a party ratifies the act of another an agency relationship is thereby created for vicarious liability purposes. Thus, where a Defendant knows that an agency's calls are illegal but accepts the benefit of those calls anyway, it might be vicariously liable for those calls as if they were authorized by the creditor in the first instance.

In *Henderson* the Ninth Circuit panel found sufficient facts existed to uphold a jury finding on such a theory against USA Funds: "Here, a reasonable jury could conclude that USA Funds accepted the benefits – loan payments – of the collectors' calls while knowing some of the calls may have violated the TCPA. If a jury concluded that USA Funds also had 'knowledge of material facts,' USA Funds' acceptance of the benefits of the collector's unlawful practices would constitute ratification."

What was that evidence? Well, apparently, USA Funds had audited the performance of the debt collectors and found the collectors were violating the TCPA. Although it, apparently, asked its servicer to make sure corrective measures were taken, it did not instruct the servicer to fire the collectors. And that, apparently, is all it takes to ratify illegal conduct these days.

Hmmm.

So what was USA Funds to do here? The Ninth Circuit seems to punish the Defendant for conducting an audit. Sure the Defendant could have adopted a zero tolerance policy for TCPA violations and fired (or instructed its servicer to fire) every collector that ever made a booboo, but that seems a bit harsh and inappropriate from a policy perspective. Mistakes happen and folks shouldn't be ever fearful of losing their seat with a creditor merely because of an oversight here or there. Then again, the TCPA itself is a strict liability statute, so perhaps it is appropriate that TCPA compliance requirements by collectors be likewise unyieldingly unjust.

The Defendant also, presumably, could have avoided liability by returning the benefit of the illegal conduct – and thus not "ratifying" it – but how does that work in this context? The money the collectors collected was actually owed. So was the Defendant supposed to return the debtor's account to a delinquent status and send him/her a check and ask for the money all over again? That's just bizarre. The problem is that the debtors conduct of going delinquent was illegal–that is to say, contrary to law– in the first place. So the Court's order finding that the creditor had benefited from an illegal act is not quite right– the illegal act of the creditor had cured the debtor's illegal act, it hadn't inured to the benefit of the creditor in any true sense. Now obviously "two wrongs don't make a right" but correcting one wrong without correcting the other doesn't make a right either, especially in this context. So now I have a headache.

Rather than focus on all the new questions *Henderson* raises, however, it is likely best to focus on the one question it actually answers quite clearly – creditors are not per se liable for calls by debt collectors, and that's a very important ruling for a TCPAworld looking for clarity.