

Actions Speak Louder Than Words: Monitronics Fails To Escape TCPA Morass

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The court's latest ruling in the ongoing Monitronics TCPA litigation, (*In Re: Monitronics International Inc., Telephone Consumer Protection Act Litigation*, MDL No. 1:13-MD-2493 (Bailey), Doc. 1271, April 3, 2019) sends a fundamental message about vicarious liability exposure under the TCPA: a seller's actions speak louder than words in any agreement. In doing so, the ruling provides a virtual road map of conduct to avoid and adapt when employing third-party telemarketers.

Monitronics International, Inc. ("Monitronics" or "Company") engaged ostensibly "independent" authorized dealers to market its alarm monitoring services. When these dealers played fast and loose with TCPA requirements, the Company found itself enmeshed in multiple separate TCPA lawsuits, each alleging that it was vicariously liable for those violations. With some 30 separate cases currently consolidated in the Northern District of West Virginia, Monitronics sought to extricate itself from this TCPA morass by seeking summary judgment on the issue of its liability.

In doing so, the Company put forth arguments reminiscent of the scene in the Wizard of Oz – where Dorothy and friends were told to "pay no attention to the man behind the curtain."

First, the Company claimed that it was not even the seller of the services for TCPA purposes. Then it contended seriatim that there was no evidence that it satisfied any of the agency principles (formal agency, apparent authority or ratification) under which it admittedly could be held vicariously liable for the dealers' telemarketing activities. In part, Monitronics pointed to wording in its dealer agreements that expressly disclaimed any agency relationship, prohibited the dealers from violating the TCPA and provided for indemnification.

Judge Bailey, in an encyclopedic tour of TCPA decisions, coupled with a treatise-like explication of the Restatement of Agency, unequivocally rejected each of these arguments and denied the motion for summary judgment, sending the cases to jury trial.

First, the primary purpose of the dealers' illicit calls was to persuade the customer to execute an alarm-monitoring contract requiring the payment of a monthly fee; Monitronics purchased the vast majority of these contracts and there was evidence that the dealers worked only with Monitronics. Finally, the Company profited even in the relatively few cases where it did not purchase the contract. Since the underlying purpose of the calls was to increase the flow of business to Monitronics, it was a

“seller” for TCPA vicarious liability purposes.

Second, in addressing the agency principles, the court stated that there was evidence that “Monitronics controlled the manner in which Authorized Dealers ran their businesses.” Among other things, the Company repeatedly provided approved telemarketing scripts that “authorized and even encouraged ...[the] use [of] Monitronics name during telemarketing calls.” Monitronics dictated the price range the dealers could charge for and monitoring services and required the dealers to use “contracts that Monitronics drafted and approved....” The Company engaged in “no other retail efforts” and knew that the dealers “were engaged in unauthorized conduct, but failed to take any effective steps to stop it until millions of illegal telemarketing calls had already had been made.” Indeed, the court noted that by the time Monitronics engaged outside counsel to develop a strategy to handle the dealers’ telemarketing violations, according to plaintiff’s experts, the dealers “already had placed approximately 26,532,337 unlawful calls to potential Monitronics customers.” Yet, the Company did not terminate the dealers and continued to accept the benefits of their activities. All of this – and more – was enough for the court to conclude that a jury could find that the requirements to establish implied actual agency, apparent authority and ratification were present.

Multiple lessons to be learned about “don’ts” to be avoided in dealing with and using dealers and agents to engage in automated telemarketing calls. A close read for anyone who does so is warranted.

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National Law Review, Volume IX, Number 98

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