

TCPA Case Dismissed Because Agents Lacked Authority

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Under the TCPA, liability attaches to the party who makes the call. Easy enough. But it goes further than that. The FCC has interpreted the TCPA to reach sellers who can be held liable for the acts of “a third-party marketer . . . under federal common law principles of agency.” *In re Joint Petition Filed by Dish Network, LLC, et al.*, 28 F.C.C. Rcd. 6574 at par. 1 (2013). This agency principle includes “apparent authority and ratification.” *Id.*, par. 28.

Yet this expansive liability is not limitless, as plaintiff Craig Cunningham recently learned after dismissal of his claims against a health insurance company in Tennessee. *Cunningham v. Health Plan Intermediaries Holdings, LLC*, No. 3:18-cv-00518, 2021 U.S. Dist. LEXIS 91978, *3 (M.D. Tenn. May 14, 2021). Mr. Cunningham alleged in conclusory fashion that the company’s “third-party agents” called him to “sell him health insurance.”

The Court granted the health insurance company’s motion to dismiss. First, Mr. Cunningham did not sufficiently allege that the insurance company “took steps to physically initiate a call.” So there was no direct liability. Second, the Court rejected Mr. Cunningham’s agency arguments, considering various common-law categories of agency:

- **Actual Authority.** The Court held that Mr. Cunningham failed to allege actual authority because his complaint did not “identify a principle for the alleged web of agents. An agency relationship cannot exist without a principal.”
- **Apparent Authority.** Also, the Court concluded that Mr. Cunningham failed to allege “apparent authority.” Specifically, Mr. Cunningham did not allege any statements that tied the company, as apparent principal, to any calls made by any alleged “agents.”
- **Ratification.** Finally, Mr. Cunningham failed to allege “ratification.” The Court quoted FCC guidance that a “seller’s liability for the activities of a third-party robo-caller must nevertheless be tied into some identifiable agency principle—there is no strict liability merely because the unlawful calls were made on behalf of the seller.”

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