

MIXED BAG: TCPA Defendant RCI, LLC. Wins Some and Loses Some in Motion For Summary Judgement

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On September 20, 2024, the U.S. District Court for the District of New Mexico came out with a fascinating decision in *Ruben Escano v. RCI, LLC.*, 2024 WL 4253000, granting in part and denying in part Defendant RCI's motion for summary judgment. This case involves 27 telemarketing calls allegedly made by RCI between February 2018 and January 2021, leading to wide ranging claims centered on telemarketing violations under both federal and New Mexico state law. The mixed decision contains some important insights on determinations of liability and private right of action.

Let's break it down:

The Plaintiff's Claims

Ruben Escano alleged that RCI violated a host of telemarketing and consumer protection laws, asserting 15 different counts:

1. Utilizing ATDS to transmit a telephone call to a cell phone. 47 U.S.C. § 227(b)(1)(A) (iii).
2. Utilizing an artificial or prerecorded voice to deliver a message to a telephone. 47 U.S.C. § 227(b)(1)(B).
3. Using an ATDS in such a way that two or more telephone lines of a multi-line business are engaged simultaneously. 47 U.S.C. § 227(b)(1)(D).
4. Allowing a more than two-second delay before responding to answered call. 47 C.F.R. § 64.1200(a)(7)(i).
5. Calling a telephone number on the Federal Trade Commission's National Do Not Call Registry. 47 C.F.R. § 64.1200(c)(2).
6. Failing to have a written policy for properly maintaining an internal do-not-call list. 47 C.F.R. § 64.1200(d)(1)-(2).
7. Failing to honor a do-not-call request. 47 C.F.R. § 64.1200(d)(3).
8. Failing to provide contact information for the sponsor of call. 47 C.F.R. § 64.1200(d)(4).
9. Utilizing an ATDS with a prerecorded message to transmit a telephone call to a cell phone. N.M. Stat. Ann. § 57-12-22(A).
10. Failing to disclose the name of the sponsor of a call within 15 seconds. N.M. Stat. Ann. § 57-12-22(B)(1).
11. Using a euphemism to mispresent the purpose of a call. N.M. Stat. Ann. § 57-12-22(B)(2).

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12. Initiating a call using an ATDS that allows for a more than two-second delay when call is answered. N.M. Stat. Ann. § 57-12-22(B)(7).
 13. Making a telephone solicitation to a telephone number on the Federal Trade Commission's National Do Not Call Registry. N.M. Stat. Ann. § 57-12-22(C)(1).
 14. Circumventing a Caller ID service. N.M. Stat. Ann. § 57-12-22(C)(2).
 15. Trespass to Chattels

Defendant RCI's Motion for Summary Judgment

RCI filed a motion for summary judgement in its favor. Some of its key arguments included that:

1. It was not responsible for making the telemarketing calls.
2. The only call it could be held liable for was time-barred.
3. No evidence existed to establish vicarious liability through an agency relationship.
4. Plaintiff could not demonstrate that specific technologies like ATDS were used.
5. Certain claims did not grant a private right of action, particularly regarding failure to provide sponsor information.

The Court's Analysis and Rulings

A. Direct Liability – Denied

The court denied summary judgment on direct liability, rejecting RCI's argument that there is no evidence that it initiated the calls in question. Interestingly, the Court took into consideration a phone call made outside of the statute of limitations, holding that the call presents evidence that subsequent calls originated from the marketing division of RCI. Key factors included all subsequent calls containing the same prerecorded messages in the same voice and offering identical vacation packages and prices at resorts within RCI's time-share network. Additionally, Plaintiff received only one more call after initiating his action against the Defendant. The Court held that this was sufficient for a reasonable factfinder to find RCI directly liable for the twenty-seven calls in question.

B. Vicarious Liability

The court provided a mixed ruling on vicarious liability, denying summary judgement on the issue of actual authority but granting it on issues of apparent authority and ratification.

1. Actual Authority – Denied

The Court denied summary judgement on actual authority, holding that evidence showed a potential agency relationship between RCI and third parties, which could establish RCI's liability for the telemarketing calls. Some of the important considerations included that the calls contained identical prerecorded messages and were made to encourage attendance at resorts within RCI's timeshare network, RCI's business development team training people at these resorts in selling timeshares, RCI tracking sales, designating the manner of submitting sales reports, and assisting in increasing sales, and comingling of personnel and finances.

Additionally, the Court was not convinced by Defendant's argument that it was entitled to summary judgement because Plaintiff lacked precise knowledge of who made the calls. The Court did not find it necessary to positively identify the caller because there was sufficient evidence that RCI has an agency relationship with whomever the caller is.

2. Apparent Authority – Granted

The Court granted summary judgment, agreeing with RCI that Plaintiff had failed to demonstrate an agency relationship under a theory of apparent authority. In doing so, the Court rejected Plaintiff's argument that such a relationship was evidenced by RCI permitting the use of its branding and logos on marketing material and the use of RCI's tradename on a call. Additionally, the Court held that third party callers being connected to illegal telemarketing investigations was not sufficient to show that RCI should have been aware of their conduct. Therefore, Plaintiff failed to prove the knowledge requirement, that the agent believed it had authority to act on behalf of RCI and that RCI knew that the agent was violating the TCPA.

3. Ratification – Granted

Similarly, the Court granted summary judgment on the issue of ratification, agreeing with the Defendant that Plaintiff had not produced any evidence that RCI knew of any of the calls at issue, or that RCI took any affirmative action to ratify the calls.

C. Technology-Based Counts – Denied

The Court denied summary judgment on the claims related to ATDS and prerecorded messages. The Plaintiff relied on the elements of ATDS related claims under the Supreme Court's framework in *Facebook, Inc. v. Duguid*, 592 U.S. 395, 398-409, 141 S. Ct. 1163, 1167-73, 209 L. Ed. 272 (2021), and presented evidence audio recordings beginning with the same prerecorded messages, sworn declarations describing the prerecorded messages, evidence that a cell phone number was called, and an audio recording where a phone representative stated, "I'm in a huge call center with over a hundred in the room right now." The Court held that the Plaintiff's evidence raised genuine issues of material fact regarding the use of ATDS.

D. Private Right of Action – Denied

The Court denied summary judgment, rejecting RCI's argument that no private right of action existed under 47 C.F.R. § 64.1200(d)(4), which mandates providing contact information for the sponsor of call. The Court agreed with the Plaintiff and various circuit and district court rulings, finding that Section 64.1200(d) was promulgated under 47 U.S.C. § 227(c)(1), which "concern[s] the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object", and therefore gives rise to a private right of action.

E. Attorney's Fees – Denied

Lastly, the Court denied RCI's request for attorney's fees, finding that the Plaintiff's claims were not groundless, given the evidence presented to support his case.

Takeaways

This ruling offers some interesting data points for both the plaintiff's and defendant's bars. While the plaintiff's bar may rejoice in the evidentiary value accorded to a time-barred phone call in determining direct liability and the lack of positive identification of a third-party caller required to establish actual authority, TCPA defendants get some reprieve from the relatively high threshold to show apparent authority and ratification. The rulings on the technology-based counts and private right of action come as a blow, but they are not particularly surprising considering the extensive precedent

relied on by the Court.

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