

Ohio Federal Court Dismisses TCPA Suit for Failure to Adequately Allege Seller's Vicarious Liability

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The Northern District of *Ohio* recently dismissed a **Telephone Consumer Protection Act (TCPA)** action because the plaintiff failed to allege any facts from which the court could conclude that the defendant was directly or vicariously liable for the alleged calls. See [*Seri v. CrossCountry Mortgage, Inc.*](#), No. 16-01214, 2016 WL 5405257 (N.D. Ohio Sept. 28, 2016).

In *Seri*, the plaintiff alleged that defendant Direct Source – a telemarketing vendor – made at least twenty unsolicited telemarketing calls to the plaintiff's cellular telephone using an ATDS. He further alleged that defendant CrossCountry Mortgage, Inc. ("CrossCountry") regularly had third-party telemarketers make telemarketing calls on its behalf and had an "extensive relationship" with Direct Source.

After finding quickly that the plaintiff had adequately alleged all of the other elements of his *prima facie* case, the Court addressed his three theories of liability: (1) that CrossCountry and Direct Source both made the calls independently; (2) that Direct Source made the calls but CrossCountry should be directly liable for them because it was closely involved in making them; and (3) that Direct Source made the calls but CrossCountry should be vicariously liable for them because Direct Source was acting as its agent.

First, the Court held that aggregate allegations about "CrossCountry and Direct Source" or "defendants" were insufficient because they did not "describe what individual roles CrossCountry and Direct Source had in making the alleged phone calls." *Id.* It noted that, while "lumping" two co-defendants together for some allegations is not always fatal, in this case it was because the plaintiff did not "describe with any clarity what CrossCountry's actual, individual role in the offending call is alleged to be," and as a result the Court had "no way to understand which party allegedly did what acts." *Id.* It further found that, while the allegations were not inconsistent with the conclusion that CrossCountry and Direct Source independently made the calls, no factual allegations supported the inference either. In reaching this conclusion, the Court observed that plaintiff did not allege that any of the persons with whom he spoke was a CrossCountry operator or telemarketer or identified themselves as such, that the telephone numbers from which the calls were made were associated with CrossCountry, or even that CrossCountry products or services were offered for sale during any of the phone calls. *Id.*

Next, the Court held that the factual allegations did not “support either the vicarious or direct liability of CrossCountry using Direct Source as an agent or intermediary.” *Id.* The plaintiff alleged the following specific facts about the relationship between the co-defendants:

- CrossCountry regularly utilizes the services of third-party telemarketers and lead generation services, and has an extensive relationship with Direct Source;
- Direct Source set up a webpage, which includes names of CrossCountry employees, to send leads to CrossCountry; and
- Direct Source seeks to generate leads for businesses that have contracted with it to receive its leads, including mortgage companies such as CrossCountry.

Id. at *4-5.

The Court explained that, even if it accepted them as true, those facts would not give rise to an agency relationship through the delegation of actual authority, apparent authority or ratification. *Id.* at *5 (citing [*In the Matter of Dish Network, LLC*](#), 28 F.C.C. Rcd. 6574, 6586 (2013)). The Court noted that the only alleged fact that purportedly linked CrossCountry to the calls made by Direct Source was the leads website that Direct Source had allegedly set up. But the plaintiff did not plead any facts suggesting that CrossCountry received leads or generated sales from the site – potentially ratifying Direct Source’s allegedly violative conduct – or how the site might be related to any of the calls he allegedly received. *Id.* The Court further reasoned that plaintiff’s failure to allege that his personal information was passed between defendants, that Direct Source had access to otherwise confidential Cross Country information, or even that any of the alleged phone calls included any reference to CrossCountry’s name, products or trademarks further undermined any inference of vicarious liability. *Id.*

The Court further held that these pleading deficiencies made it “readily apparent that nothing in the alleged relationship between CrossCountry and Direct Source” permitted an inference of a situation where CrossCountry was “so involved in the placing of a specific telephone call as to be directly liable for initiating it.” *Id.* at *6 (quoting *Dish Network*, 28 F.C.C. Rcd. at 6583). Ultimately, it concluded its analysis with the observation that plaintiff’s complaint pled facts that were “merely consistent” with CrossCountry’s liability, and that this “stopped short of the line between possibility and plausibility” required to survive a motion to dismiss under the federal pleading standard. *Id.*

As we have covered [previously](#), courts have proved willing to dismiss the claims of plaintiffs who fail to plead specific factual allegations regarding a seller’s actual, individual role in making the offending calls or texts or its ability to direct and control the actions of the vendor, and instead provide only conclusory allegations consistent with an inference of direct or vicarious liability. Defendants in future TCPA actions involving third-party vendors would therefore be well-advised to take a close look at the specific factual allegations supporting plaintiffs’ theories of direct or vicarious liability.

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