Dish TCPA Ruling Puts Bull's-Eye On Big-Name Companies

by Allison Grande

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An Illinois federal judge last week found Dish Network LLC liable for tens of millions of third-party telemarketing sales calls that could expose the company to billions of dollars in damages, a ruling likely to hasten the flood of class actions seeking to hold large companies responsible for smaller entities' alleged telemarketing violations.

In a 238-page opinion issued on Dec. 11, U.S. District Judge Sue E. Myerscough granted partial summary judgment to the government and four state attorneys general on a variety of claims alleging Dish Network contracted with call-center operations it knew were violating telemarketing sales rules, along with placing millions of illegal calls itself.

All told, the judge found Dish liable under the Telephone Consumer Protection Act and the Federal Trade Commission's Telemarketing Sales Rule for more than 57 million calls that were either prerecorded or placed to people who had put their number on the national Do Not Call Registry. Of the calls, roughly 5.2 million were made by Dish or one of its two telemarketing vendors, while the additional 51.8 million were made by authorized retailers that Dish had contracted with to market its products and services, according to the opinion.

While Dish argued that it could not be held vicariously liable for the rogue telemarketing activities of its retailer partners because they were not agents of the company, the judge found that Dish could take the heat for the alleged violations — which carry with them uncapped statutory penalties under the TCPA of between $500 and $1,500 — because there was evidence that the company had provided support to and had some knowledge of the retailers' unlawful activities.

"While the last year has been littered with notable TCPA decisions and record settlements, the Dish decision stands out, [as] the court took a fairly expansive view of the situations where a company is legally responsible for the conduct of its vendors," Troutman Sanders LLP partner Alan Wingfield said. "As a result, the Dish decision may well set a new, even higher bar for [federal] telemarketing rule compliance obligations and risks for any company that makes outbound telemarketing calls."

By endorsing a relatively broad universe of conduct that could put deep-pocketed companies on the hook for actions of their less wealthy contracts, the decision is likely to significantly raise the stakes for big-name entities that are already facing a barrage of private class actions under the TCPA, attorneys say.

"The judge was looking at not just traditional principles of agency, but at the knowledge that companies had, and based on that knowledge found vicarious liability," Snell & Wilmer LLP partner Becca Wahlquist said. "That holding ventures into a whole new world and may very well spawn further vicarious liability actions brought by private litigants as well as regulators."

In reaching her determination on vicarious liability, Judge Myerscough looked to a ruling on the issue that the Federal Communications Commission issued in 2013 in response to a petition filed by Dish that put the case before the Illinois court on hold.

The Dish petition asked the FCC to determine what a seller's liability would be for violations committed by third parties that telemarket the seller's goods. The regulator responded by ruling that a seller can be held liable for third parties that are determined to be its agent under the federal common law of agency, and further noted that the liability may be determined "under a broad range of agency principles, including not only formal agency, but also principles of apparent authority and ratification."

While Dish did not dispute the underlying findings of the judgment, it asked the D.C. Circuit to nix the two paragraphs of guidance that referenced the role of apparent authority or ratification in making a liability determination. But the appellate court shot down the argument in January, concluding that it had no jurisdiction over the statement because it was not binding on the courts.

However, the ruling by Judge Myerscough last week — which relied heavily on evidence such as emails that indicated that at least one Dish employee knew about one of the retailer's allegedly unlawful activities and considered but did not follow through on a punishment — clearly demonstrates that the FCC's decree is likely to have at least some sway in the courtroom, attorneys noted.

"This shows that the FCC order has opened the door for courts to consider factors outside the traditional agency analysis," Wahlquist said.

That factors like ratification and apparent authority will now play at least some role in determining vicarious liability is also noteworthy because of the lofty uncapped damages that corporate defendants can be subjected to under the TCPA, which includes a private right of action, and the TSR, which can only be enforced by the Federal Trade Commission.

"This latest order is going to continue to bring attention to both statutes and the high damages available under them, and encourage the plaintiffs bar to continue to bring cases," Klein Moynihan & Turco LLP partner David Klein said.

The judge declined to estimate potential damages in her recent order, saying that the issue will be left for a second phase of a two-part trial slated to begin in 2015 that will determine any remaining liability and set potential fines and penalties. But the federal government noted in its brief on summary judgment — which pegged the number of illegal calls at 65 million — that it could theoretically seek $725 billion in statutory damages.

While it didn't set an exact number, the government said it would seek a substantial award, noting that $1 billion would be less than two-tenths of a percent of the maximum. The four states involved in the litigation — California, Illinois, North Carolina and Ohio — have said that together, they are seeking $270 million in fines on their claims.

"As plaintiffs often do in TCPA class actions, the plaintiff governmental entities [have] argued that Dish could be liable for many billions of dollars of damages," said Martin Jaszczuk, Locke Lord LLP's TCPA class action litigation section head. "The question now is where the runaway train will stop."

If the court demonstrates a willingness during the trial phase to assess large penalties for vicarious liability under the telemarketing statutes, that could further fuel the already high incentive that plaintiffs have to pursue companies that have outsourced some of their operations to third parties, attorneys say.

"There haven't been that many cases where the court has actually adjudicated what the remedies ought to be under the TCPA or [TSR]," Wingfield said. "So whether or not the court will actually award the massive liability that the unbelievable mathematics tied to the statutory claims allows for will be the big question."

In order to sidestep the mounting risk of being found vicariously liable for the actions of their vendors, attorneys recommend that companies heed the lessons of the Dish decision, including the importance of thoroughly vetting third-party partners that they contract with to market their products or services.

"The vetting seems to go beyond just checking what may be in writing but actually monitoring to make sure that these third parties are adhering to them in practice," said Loeb & Loeb LLP partner Christine Reilly, noting that the process is "no small task for companies like Dish that engage with a large number of third-party telemarketers, who are primarily independent contractors."

Companies should also be mindful of the safe harbor provisions available under the telemarketing law, which Dish attempted to use to shield itself from liability but fell short because the judge concluded that there was no evidence that Dish had made any effort to comply with the "basic requirement" of the safe harbor defense to have written procedures and documentation.

"There are few safe harbors in this area of the law, so when the government makes them available, companies should take advantage of them," Reilly said.

However, attorneys were quick to caution that escaping vicarious liability claims was likely to be exceedingly difficult for companies, given the Catch-22 that they face.

A company that plays "hands off" of a vendor's specific conduct to avoid creating facts that show that the vendor is an agent runs the risk that a court will later say that the company is liable for the vendor anyway, while a company that supervises the vendor to prevent a violation could have that evidence cited in favor of finding that the company is responsible, Wingfield noted.

"That's exactly what happened in the Dish case," Wingfield said. "Dish did take steps to supervise some vendors, and the court cites those efforts as showing that Dish exercised control over the vendor and hence the vendor could be found to be an agent."

Dish is represented by Henry T. Kelly, Joseph A. Boyle and Lauri A. Mazzuchetti of Kelley Drye & Warren LLP.

The U.S. government is represented by Lois C. Greisman, Roberto Anguizola, Russell S. Deitch and Gary L. Ivens of the Federal Trade Commission; Stuart F. Delery, Maame Ewusi-Mensah Frimpong, Michael S. Blume, Lisa K. Hsiao, Patrick R. Runkle and Sang H. Lee of the U.S. Department of Justice; and Greg M. Gilmore of the U.S. Attorney's Office for the Central District of Illinois.

California is represented by Attorney General Kamala D. Harris and Deputy Attorney General Jinsook Ohta. Illinois is represented by Attorney General Lisa Madigan and Assistant Attorneys General Elizabeth Blackston and Paul Isaac. Ohio is represented by Attorney General Mike DeWine and Assistant Attorneys General Michael Ziegler and Erin B. Leahy. North Carolina is represented by Attorney General Roy Cooper and Deputy Attorney General David Kirkman.

The case is *U.S. et al. v. Dish Network LLC,* case number 3:09-cv-03073, in the U.S. District Court for the Central District of Illinois.

--Additional reporting by Lance Duroni. Editing by Katherine Rautenberg and Patricia K. Cole.