February 19, 2008

Nicole McGinnis  
Erica McMahon  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Dear Nicole and Erica:

We sincerely appreciated the opportunity to discuss and share our thoughts regarding your recent declaratory ruling regarding restrictions on autodialed and prerecorded message calls to wireless numbers under the Telephone Consumer Protection Act (“TCPA”) (hereinafter, the “Ruling”). As we indicated during the call, we were pleased the Commission reiterated its earlier position “that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the ‘prior express consent’ of the called party …”

As mentioned, our members were surprised by the portion of the Ruling reflected in Paragraph 10 stating:

[A] creditor on whose behalf an autodialed or prerecorded message call is made to a wireless number bears the responsibility for any violation of the Commission’s rules. Calls placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call.¹

In our view, this statement appears to imply that a creditor is liable for any violation of 47 C.F.R. § 64.1200(a)(a)(1)(iii) committed by a third-party debt collector working an account on behalf of the creditor. As discussed in detail below, general principles of agency law dictate that creditors are subject to narrower liability than this statement seems to imply. This statement also suggests a broader scope of creditor liability under the TCPA than would be available under federal and state debt collection laws, where the application of agency law to limit the extent of a creditor’s vicarious liability for the acts of third-party collectors is well established. We respectfully submit the following for your consideration.

**General Agency Principles Govern Vicarious Liability Under The TCPA**

¹ Additionally, this sentence was footnoted with the following: “A third party collector may also be liable for a violation of the Commission’s rules. In addition, prior express consent provided to a particular creditor will not entitle that creditor (or third party collector) to call a consumer’s wireless number on behalf of other creditors, including on behalf of affiliated entities.”
The United States Supreme Court has held that general agency principles govern the scope of vicarious liability under a federal statute unless Congress specifically indicates otherwise. *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (“[W]hen Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules”) (rejecting application of the non-delegation doctrine under the Fair Housing Act).

- Congress may establish specific rules for indirect liability under a particular statutory scheme and has done so on several occasions. However, nothing in the TCPA’s language establishes any explicit vicarious liability scheme. The relevant provision of the TCPA’s is focused on proscribed acts. *Compare* 47 C.F.R. § 227(b)(1)(iii) (“It shall be unlawful for any person . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service . . . .”) *with Meyer*, 537 U.S. 280 at 285 (“The Fair Housing Act itself focuses on prohibited acts . . . . It says nothing about vicarious liability.”).

- Therefore, because Congress has not provided differently, general agency principles should govern vicarious liability under the TCPA.

- When analyzing the scope of vicarious liability, the United States Supreme Court typically has looked to the Restatement of Agency. *See Burlington Industries, Inc.*, 524 U.S. 742, 755 (1998) (“*[T]he Restatement (Second) of Agency . . . is a useful beginning point for a discussion of general agency principles*”).

**Whether Creditors Are Vicariously Liable For Third-Party Debt Collector Under Applicable Agency Principles Depends On The Particular Facts**

A. **General Agency Principles**

- The liability rules for employees and non-employee agents are different. *Compare* Restatement (Second) of Agency § 219 *with* Restatement (Second) of Agency § 250.

- A principal may be held liable for the actions of a non-employee agent on several grounds. For example:
  - The principal intended the agent to undertake such conduct or otherwise authorized the acts at issue. Restatement (Second) of Agency §§ 212, 250.
  - The principal is negligent in supervising the agent. Restatement (Second) of Agency §§ 213, 250.
However, a principal is not liable for the acts of a non-employee agent if the agent did not have authority to take the acts at issue and the principal was not negligent in supervising the agent. Restatement (Second) of Agency § 250.2

B. Application of General Agency Principles Under the Debt Collection Laws

Where creditors have not had control over the conduct of a collection agency, courts have determined that creditor was not liable for the actions of the collection agency because the agency was an independent contractor.3 E.g., Craig v. Andrew Aaron & Assoc., Inc., 947 F. Supp. 208, 212 (D.S.C. 1996).

Where creditors have control over a collection agency, but that agency acted illegally and contrary to the instruction of the creditor, courts have found that the creditor is not liable because its agent acted without actual or apparent authority. E.g., Household Credit Servs., Inc. v. Driscoll, 989 S.W.2d 72, 87 (Tex. App. Ct. 1998).

Conversely, where a creditor has control over a collection agency and the agency acted with the creditor’s authority, courts have found the creditor to be liable. E.g., Morante v. Am. Gen. Financial Center, 157 F.3d 1006, 1010 (5th Cir. 1998); see also American Family Publishers, Inc., FTC Docket No. 9240, 57 Fed. Reg. 32,220 (July 21, 1992) (proposed consent decree settling the FTC’s allegation that a creditor had encouraged collection agencies to violate debt collection laws in violation of Section 5 of the FTC Act).

Implying That Creditors Are More Broadly Liable For Third-Party Debt Collectors Unfairly Subjects Creditors to Additional Liability

A third-party debt collector, through no fault of the creditor, may contact a party other than the accountholder. The collector necessarily will not have obtained prior express consent from such party. Cf. Watson v. NCO Group, Inc., 462 F. Supp. 2d 641, 645 (E.D. Penn. 2006) (refusing to dismiss a claim for violating the TCPA Do-Not-Call List proscription where, rather than a call being made to a debtor, a call was made to a third party with whom no established business relationship existed).

2 In contrast, agency law imposes broader liability for acts by employees. Restatement (Second) of Agency § 219(1) (principal liable for the acts of employees committed within the scope of their employment).

• Such calls could be the result of a clerical error by the collector’s personnel, a systems issue at the collection agency, or incorrect skip tracing performed by the collection agency.

• A creditor would not be liable for such mistakes under general agency principles, at least without additional facts indicating negligence or ratification by the creditor.

• Conversely, if a creditor directs a collector to call an accountholder’s wireless numbers where the creditor has not received prior express consent, the creditor likely would be liable for the collector’s conduct under general agency principles. The creditor specifically authorized the act at issue, and thus bears liability.

• Creditors routinely manage their relationships with third-party debt collectors not only to ensure the collector’s compliance with law, but also to limit vicarious liability.

• Collectors obviously are in the best position to ensure their own compliance with the TCPA. Suggesting that creditors in the first instance bear liability for a collector’s TCPA violations significantly dilutes the collector’s disincentive against acting unlawfully.

We hope you find the above information to be helpful in your reassessment of the issue we have raised. Please feel free to contact me at 202-296-5544, ext. 616 or bhimpler@afsamail.org if you wish to further discuss this or have any questions regarding anything contained herein. Thank you again for your attention to and consideration of this important matter.

Sincerely,

Bill Himpler
Executive Vice President, Federal Affairs
American Financial Services Association