

## Sellers Are Not Liable For Independent Contractors' Calls

By Patrick McLaughlin

*Law360, New York (August 25, 2017, 12:54 PM EDT) --*

In a recent decision that may affect any company that sells products or services using telemarketers, the United States Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment in *Jones v. Royal Admin. Servs. Inc.* in favor of a product seller, holding the seller was not vicariously liable for calls made by a telemarketer in violation of the Telephone Consumer Protection Act[1] (TCPA) because the telemarketer was an independent contractor.

Based on this decision, we recommend that sellers should review their contracts and make sure the telemarketers they use are independent contractors, both by the express terms of their contracts and also, more importantly, by the amount of control the seller retains over the manner and means of the telemarketing calls.

Simply put: the more control a seller retains, they more likely they will be exposed to vicarious liability if their telemarketer violates the TCPA.



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### TCPA Regulations

The TCPA makes it unlawful for a 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 or any service for which the called party is charged for the call. The regulations implementing the TCPA prohibit, among other things, a "person or entity" from "initiat[ing] any telephone solicitation to ... [a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry."

### *Jones v. Royal Admin. Servs. Inc.*

Defendant Royal Administrative Services Inc. (Royal) sells vehicle service contracts (VSC), which are often referred to as extended warranties. Royal sells its VSCs through automobile dealers and through "marketing vendors." These marketing vendors sell Royal's VSCs through direct mail or telemarketing. Royal sells VSCs through about 20 different marketing vendors. Defendant All American Auto Protection Inc. (AAAP) is one of those marketing vendors.

AAAP sold VSCs for companies like Royal through telemarketing. In October 2011, Royal entered into a

marketing agreement with AAAP which contained authorized sales and marketing methodologies with which AAAP was required to comply. The agreement “[e]xpressly excluded from these methodologies ... any act or omission that violates applicable state or Federal law, including but not limited to ‘robo-calling.’”

A Royal employee provided training to AAAP’s employees at AAAP’s call center in Azusa, California. During this training, he provided information about Royal’s VSCs, claim structure, coverage, pricing and customer service. Royal’s president visited the call center with this employee about a dozen times from 2011 to 2014. During these visits, AAAP’s officials provided assurances that the telemarketers were complying with the TCPA by dialing customers one at a time and honoring the do-not-call list.

Plaintiffs Jones and Watson are individuals living in Reno, Nevada, whose cellular telephone numbers are registered on the national do-not-call registry. Jones asserts that he received four calls on his cellular telephone from AAAP in March 2014. During one of these calls, Jones spoke to with an agent of AAAP, who offered to sell Jones a VSC called the “Diamond New Car” protection plan. Jones was then transferred to another agent, who confirmed that he was calling from AAAP. Watson asserts that he received four calls to his cellular telephone from AAAP in April and May of 2014. Jones and Watson allege AAAP placed the calls using an “automatic telephone dialing system.”

The plaintiffs filed a class-action law suit against AAAP, several of its officers and Royal.

### **The Ninth Circuit’s Analysis**

The plaintiffs allege Royal was vicariously liable for AAAP’s calls that were made in violation of the TCPA. The district court granted the motion and entered judgment in favor of Royal, and the plaintiffs appealed to the Ninth Circuit. On appeal, Royal did not dispute that AAAP’s telemarketers violated the TCPA. Rather, Royal disputes whether it can be held vicariously liable for AAAP’s calls.

The Ninth Circuit, relying on its recent precedent, explained that a defendant may be held vicariously liable for TCPA violations where the plaintiff establishes an agency relationship, as defined by federal common law, between the defendant and a third-party caller. Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act. In contrast, an individual acting as an “independent contractor,” rather than an agent, does not have the traditional agency relationship with the principal necessary for vicarious liability. Generally, a principal is not vicariously liable for the actions of an independent contractor, because the principal does not have sufficient control over an independent contractor.

Explaining that the extent of control exercised by the principal is the “essential ingredient,” the Ninth Circuit adopted the following 10 factors as relevant to the determination of whether an individual providing services for a principal is an agent or an independent contractor: 1) the control exerted by the employer, 2) whether the one employed is engaged in a distinct occupation, 3) whether the work is normally done under the supervision of an employer, 4) the skill required, 5) whether the employer supplies tools and instrumentalities [and the place of work], 6) the length of time employed, 7) whether payment is by time or by the job, 8) whether the work is in the regular business of the employer, 9) the subjective intent of the parties, and 10) whether the employer is or is not in business.[2]

The Ninth Circuit acknowledged that Royal exercised some amount of control over AAAP: AAAP was required to keep records of its interactions with consumers who purchased Royal VSCs, give Royal

weekly reports on VSC sales, and provide notice of requests to cancel Royal VSCs. Royal also approved the scripts and materials AAAP used and required AAAP to follow its guidelines in making calls, including representations that the calls were made lawfully.

Ultimately, however, the Ninth Circuit held that Royal did not have sufficient control to find that AAAP was its agent. Facts the court found significant in this conclusion included: Royal did not have the right to control the hours the telemarketers worked nor did it set quotas for the number of calls or sales the telemarketers had to make; AAAP was an independent business, separate and apart from Royal; it was engaged in the distinct occupation of selling VSCs through telemarketing; the calls made by AAAP's telemarketers were not normally done under the supervision of Royal; AAAP provided its own phones, computers, furniture and office space; AAAP was paid a commission for each sale, rather than for the time the telemarketers worked.

Based on the totality of these factors, despite finding that Royal retained some control over AAAP, the Ninth Circuit held that AAAP was an independent contractor, rather than Royal's agent, and Royal cannot be held vicariously liable for any calls the telemarketers made in violation of the TCPA.

### **Takeaways**

The Ninth Circuit's application of the control factors test of the restatement to determine if a telemarketer is an agent of the seller for purposes of vicarious liability under the TCPA should serve as a guidepost to sellers who market their products using telemarketing — particularly those within the Ninth Circuit.

As mentioned above, sellers should review their contracts and make sure the telemarketers they use are independent contractors, both by the express terms of their contracts and also, more importantly, by the amount of control the seller retains over the manner and means of the telemarketing calls. Simply put: the more control a seller retains, the more likely they will be exposed to vicarious liability if their telemarketer violates the TCPA.

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