

Call Waiting: *Charles A. Jones v. Royal Administrative Services, Inc., The TCPA, and Independent Contractors*

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Picture this: You come home from a long day at work and take your shoes off. You change into comfy clothes and begin to spend quality time with your family. You make a fabulous one of a kind dinner for you and your loved ones. You serve this amazing meal to your family and you savor each and every bite. You forget about the troubles at work, your boss' attitude and the deadlines as you are surrounded by smells, your family's laughter and the comforts of home. Then, out of nowhere, your phone begins to ring. You say to yourself, "but it's 7 at night for crying out loud! Who's calling me?" You sigh heavily, forget to look at caller id and pick up the phone. Is it your boss, or a family emergency or a friend? Of course not, because even your boss, family and friends have manners! It is a telemarketer bothering you for the umpteenth time telling you that you have won a free trip or some other scam. You scream that you are not interested and

slam the phone down. Your tranquil evening is ruined, the ambiance to your meal is spoiled and your food has gotten cold.

The public hates telemarketers as much as they hate politicians (and supposedly lawyers). The growing surge of disgust towards these companies lead Congress to finally take action and pass the Telephone Consumer Protection Act ("TCPA" or otherwise known as the "Do Not Call List"). This law was supposed to protect the consumer and make any company who violated this list pay a fine. The public was overjoyed.

But what happens when the telemarketer is hired as a third party? Is the company that hired the telemarketers vicariously liable for violations committed by the telemarketers? What if the agreement defines the employment relationship between the company and telemarketers? Does that make a difference?

The Charles A. Jones v. Royal Administration Services, Inc. Matter

The Ninth Circuit Court ruled on the matter of *Charles A. Jones v. Royal Administration Services, Inc.* on August 9, 2017. Plaintiff is an individual living in Reno, NV whose cellular telephone number is registered on the national do-not-call registry. Plaintiff alleged he received four calls on his cellular telephone from All

American Auto Protection, Inc. ("AAAP") in March 2014. AAAP entered into a marketing agreement with defendant Royal Administration Services, Inc. ("Royal") in October 2011. The agreement between Royal and AAAP was for the marketing and sales of Royal's vehicle service contracts.

Plaintiff alleged that during these four calls, an AAAP employee offered to sell him a vehicle service contract called the "Diamond New Car" protection plan. Plaintiff declined to purchase the plan, but continued to receive unwanted solicitations which plaintiff believes were used via an "automatic telephone dialing system."

Plaintiff filed a class-action lawsuit against AAAP for violations of the TCPA. An amended complaint was filed which also added Royal as a defendant. The amended complaint asserted Royal was vicariously liable for AAAP's calls that were made in violation of the TCPA and the federal regulations implementing the TCPA. On June 17, 2015, Royal filed a motion for summary judgment, which the United States District Court for the District of Nevada granted and plaintiff appealed.

What Is the Telephone Consumer Protection Act?

The Telephone Consumer Protection Act ("TCPA") was

passed by Congress in 1991 and amended the Communications Act of 1934. It is codified as 47 USC Section 227. The TCPA restricts telephone solicitations, such as telemarketing, and the use of automated telephone equipment. The TCPA limits the use of automatic dialing systems, artificial or prerecorded voice messages, SMS text messages and fax machines. It also prohibits solicitors from calling residences before 8 a.m. or after 9 p.m. local time and requires solicitors to maintain a “do-not-call” list of consumers who asked not to be called. If a deliberate violation of the TCPA is found, a subscriber may sue for up to three times the damages for each violation.

The Difference Between Agent and Independent Contractor

Courts have previously found 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.” (*Gomez v. Campbell-Ewald Co.* (2014) 768 F.3d 871, 878). In general, “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.” (*Marvix Photographs, LLC v. LiveJournal, Inc.* (2017) 853 F.3d 1020, 1029). The Restatement (Third) of Agency Section 1.01

has also established that for an agency relationship to exist, the agent must have authority to act on the principal’s behalf and the person represented has the right to control the agent’s actions.

Analysis

The Ninth Circuit considered 1) if AAAP was an independent contractor or an employee of Royal and 2) could whether Royal could be variously liable for the TCPA violations committed by AAAP. The Court deferred to *United States v. Bonds* (2010) 608 F.3d 495, 505, which outlined ten factors as relevant to whether an individual providing services 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 stools and instrumentalities [and 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.

The Ninth Circuit acknowledged Royal exercised some amount of control over AAAP because Royal required AAAP to keep records of interactions with consumers who purchased Royal’s product, collect payments on behalf of Royal and to obtain Royal’s approval before using sales literature to sell Royal’s

product (i.e. the use of Royal’s “scripts and materials” to sell its product).

However, the Ninth Circuit also acknowledged there were several facts which showed Royal did not have any control over AAAP. For example, Royal did not have any control over an AAAP telemarketer until the telemarketer decided to sell a Royal product. Also, AAAP is an independent business and did not have any association with Royal other than the marketing agreement from October 2011. Furthermore, Royal did not supervise AAAP’s calls to potential customers. While Royal may have provided some “materials” to complete the sales, Royal did not provide any phones, computers, and furniture or office space to AAAP employees. AAAP was also paid a commission for each Royal sale and AAAP sold contracts for other vendors and car dealerships. Lastly, the contract between Royal and AAAP had a specific provision between the two companies which stated AAAP would be an independent contractor rather than an employee of Royal. Given all of these factors, the Ninth Circuit found that there was not enough control Royal had over AAAP to make AAAP an employee of Royal rather than an independent contractor.

After the Ninth Circuit found that AAAP was an independent contractor of Royal, the Court determined that Royal could not be held vicariously liable for any calls AAAP telemarketers made

in violation of the TCPA.

Ultimately, Royal did not have enough control over AAAP to have AAAP telemarketers qualify as Royal's acts when the calls were placed, thus negating any liability Royal would have for AAAP's actions.

Takeaways:

The moral of the story is this: annoying phone calls you receive while you are eating dinner is most likely from an independent third party who is being paid by another company. To combat these claims, the defense should retain an attorney who understands the complexities of federal court TCPA claims and will assert the appropriate defenses when a third party is involved and vicarious liability is raised.

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