

## Independent Contractor vs. Agent under the TCPA

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The Ninth Circuit Court of Appeals went back to the basics in addressing whether a telemarketing vendor acted as defendant's authorized agent for purposes of TCPA liability. In [Jones v. Royal Admin. Servs., Inc.](#), No. 15-17328, 2017 WL 3401317 (9th Cir. Aug. 9, 2017) ("*Jones*"), the Ninth Circuit endorsed the time-honored multi-factor test set forth in Restatement (Second) Of Agency, and on that basis affirmed the district court's grant of summary judgment. The decision provides further reassurance that traditional agency principles apply in assessing potential TCPA exposure related to calls.

### **The Underlying Dispute**

Plaintiffs Jones and Watson initially sued All American Auto Protection, Inc. ("All American"), alleging that defendant called him on his cellular telephone four times with telemarketing offers. After All American defaulted, Jones filed an amended complaint, adding Royal Administration Services as a defendant, claiming that All American acted as Royal's agent in placing the calls. On Royal's motion for summary judgment, the district court ruled that All American was not Royal's agent, but rather Royal's independent contractor, and that Royal therefore was not vicariously liable for the calls.

### **The Appeal**

On appeal, Plaintiffs argued that Royal had actual authority over All American, and was therefore vicariously liable for its agent's telemarketing calls. The Ninth Circuit rejected that argument, however, explaining that "not all relationships in which one person provides services to another satisfy the definition of agency." *Id.* at \*4 (internal citation omitted). Rather, 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." *Ibid.* (citing *United States v. Bonds*, 608 F.3d 495, 505-06 (9th Cir. 2010)). Instead, "the 'extent of control exercised by the [principal]' is the 'essential ingredient,'" in assessing the existence of the agency relationship.

The Court adopted the ten Restatement (Second) of Agency factors. *Ibid.* (quoting *Bonds*, 608 F.3d at 504-505). The facts suggestive of an agency relationship included:

1. "[All American] 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.";
2. "[All American] was only permitted to use the 'scripts and materials' Royal approved and had to comply with the 'guidelines and procedures' Royal provided when selling Royal products."; and
3. "Royal also trained the [All American] telemarketers in how to sell Royal [VSCs]."

*Id.* at \*\*4-6 (internal citations and quotation marks omitted). On the other side of the scale:

1. "The original contract was in effect for only one year, with each party retaining the ability to cancel the contract at any time on 30 days' notice." ("The designated impermanency of the relationship supports a finding of independent contractor status.");
2. "[All American] provided its own equipment, set its own hours, and only received payment if one of its telemarketers actually made a sale."; and
3. "[A]lthough Royal had some control over [All American]'s telemarketers, it did not specifically control the calls at issue in this case because the telemarketers never attempted to sell a Royal VSC during those calls."

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*Ibid.* (internal citations and quotation marks omitted). Taken together, the Court found it “clear that [All American]’s telemarketers were independent contractors rather than agents.” *Ibid.*

### **Looking Ahead**

Vicarious liability is an important and frequently-litigated TCPA issue. Following *Jones*, courts within the Ninth Circuit will apply the following Restatement (Second) of Agency factors in TCPA cases involving issues of agency:

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.

*Id.* at \*4 (quoting Restatement (Second) Of Agency § 220(2)). Companies operating in the Ninth Circuit should examine their existing contracts and relationships with third-party telemarketing providers and lead-generation vendors to assess their level of exposure to vicarious liability claims. Furthermore, companies should take each of these factors into account when they structure new business relationships with any such entities.

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