

Federal Common Law and the TCPA: Ninth Circuit Denies Rehearing in *Henderson* and Holds Federal Common Law of Agency, Not California Law, Controls in the TCPA

Article By:

Daniel L. Delnero

The Czar [previously blogged](#) about the Ninth Circuit's *Henderson* decision and the seemingly harsh consequences it has for vicarious liability of creditors. See *Henderson v. United Student Aid Funds, Inc.*, 918 F.3d 1068 (9th Cir. 2019). Well, the Ninth Circuit just denied the defendant's petition for rehearing en banc and, in the process, somewhat clarified the law applicable to vicarious liability under the TCPA.

To recap, the issue in *Henderson* was whether a creditor is vicariously liable for TCPA violations of a debt collector. The Ninth Circuit panel first held that a creditor is not *per se* liable for acts of a debt collector. But then, it went on to hold that the creditor in that particular case could be found liable under a ratification theory because the creditor discovered the alleged TCPA violations in audits but still accepted payments made to the debt collectors who committed them.

But even accepting the court's basic premise, there was a major complicating factor. And the defendant latched onto it to seek rehearing or rehearing *en banc* (i.e., where all 987 judges in the Ninth Circuit hear an appeal collectively).

The complicating factor was that the Ninth Circuit had previously held that ratification requires an underlying principal-agent relationship under California law. See *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003). But as two judges pointed out in rejecting rehearing, that's California law, and the TCPA is federal. And under the main FCC vicarious liability opinion, federal common law and the Restatement (Third) of Agency, not state law, control. See *In re Joint Petition Filed by Dish Network, LLC*, 28 F.C.C. Rcd. 6574, 6574 (2013). The judges further reasoned that under the Restatement, ratification is an independent basis on which to find agency.

Applying federal common law to the TCPA does, of course, make sense. The TCPA is a federal statute and (in theory) should have the same meaning in all 50 states rather than be dependent on unique state law agency principals. That is why federal courts routinely incorporate federal common law principals into the TCPA; in fact, the Second Circuit relied heavily on the Restatement of Contracts in *good-Reyes*. But uniformity of federal law does ring somewhat hollow coming from the Ninth Circuit, which broke from the Third Circuit in *Marks* and created a circuit split on the even more fundamental question of the definition of an ATDS.

And as the Czar pointed out in our prior coverage, the *Henderson* panel's reasoning is subject to criticism, even under federal common law principals. The evidence the court held could create an issue of fact was weak and the plaintiffs themselves engaged in wrongdoing by not paying their bills. Thus, even accepting the Ninth Circuit's legal proposition, the case was still a solid candidate for summary judgment.

The upshot is that the *Henderson* panel's holding that creditors are not automatically liable for TCPA violations of debt collectors is safe. The downside, though, is that the expansive interpretation of vicarious liability also remains in place. As that part of the decision is case-and-fact specific, it will hopefully be limited or corrected over subsequent decisions.

© Copyright 2025 Squire Patton Boggs (US) LLP

National Law Review, Volume IX, Number 126

Source URL: <https://natlawreview.com/article/federal-common-law-and-tcpa-ninth-circuit-denies-rehearing-henderson-and-holds>