

District of Nevada Applies Agency Principles to TCPA Suit Against Messaging Platform and Consumer-Info Company, Dismisses Claims

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Last week, the District of Nevada contributed to a growing consensus among Ninth Circuit district courts that TCPA liability generally does *not* extend to companies that produce equipment used to place unlawful calls—such as messaging platforms and contact lists—because the entities that use such equipment usually do so on behalf of *another* company, and not the equipment provider.

In [*Edwards v. Juan Martinez, Inc.*](#), the plaintiff received four unsolicited calls from a realtor regarding properties for sale in the plaintiff's neighborhood. 2020 WL 7260931, at *1 (D. Nev. Dec. 10, 2020). The plaintiff sued the realtor and his firm, and later amended his complaint to add TCPA claims against RedX—a Utah company that made the texting platform used by defendants—and Cole Information, a Nebraska company that produced the contact list that included the plaintiff's number. *Id.* The plaintiff asserted that RedX, Cole Information, and their officers were all “vicariously liable” for the realtor's cold-call because he utilized their products and services to place the call. *Id.*

The court first found that it lacked personal jurisdiction over both RedX and Cole Information, *id.* at *3-4, but it went on to conclude that, *even if* it had jurisdiction, the plaintiff's claims failed because agency principles governed vicarious liability in the TCPA context, and neither RedX nor Cole Information had a relationship with the defendant realty firm beyond having sold it products that were used to conduct the unlawful calls. The court explained that, although the statute's plain language assigns civil liability to whomever “makes” the call, the Ninth Circuit has affirmed the existence of vicarious liability “for those that maintain an agency relationship with the caller” *Id.* at *5. In other words, “a defendant is vicariously liable for violations of the TCPA where common law principals [*sic*] of agency would impose it.” *Id.* (quoting *Jones v. Royal Admin. Servs., Inc.*, 887 F.3d 443, 449-50 (9th Cir. 2018)). Therefore, the Ninth Circuit has explained that, “[i]n determining whether vicarious liability [under the TCPA] may be imposed, the *extent of control* exercised by the [principal] is the essential ingredient.” *Id.* (quoting *United States v. Bonds*, 608 F.3d 495, 505 (9th Cir. 2010)) (emphasis added) (internal quotation marks omitted).

Applying traditional agency principles, the court determined that—based on the allegations in his complaint—the plaintiff was unable to establish that either RedX or Cole Information exercised any

control over the realty firm, and he therefore could not succeed on a claim for vicarious liability. *Id.* at *6. Unlike the defendants in the Ninth Circuit cases where vicarious liability applied, RedX and Cole Information “are not principals; they are software and data providers that sold technology and customer lists” to the realty firm, and they were uninvolved with the firm’s unlawful use of their equipment. *Id.* (citing *Jones*, 887 F.3d at 453; *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 877 (9th Cir. 2014)). And although the Ninth Circuit has not yet addressed whether a provider of technology or equipment used to violate the TCPA can be held vicariously liable, the court noted that other districts within the Circuit have declined to extend liability to such companies under the agency analysis. See *id.* (citing *Canary v. Youngevity Int’l, Inc.*, 2019 WL 1275354, at *6 (N.D. Cal. Mar. 20, 2019); *Meeks v. Buffalo Wild Wings, Inc.*, 2018 WL 1524067, at *5 (N.D. Cal. Mar. 28, 2018); *Linlor v. Five9, Inc.*, 2017 WL 2972447, at *4 (S.D. Cal. July 12, 2017)). Because it was clear from the complaint that the realtor who called plaintiff was not acting at the direction of RedX or Cole Information, the court dismissed the claims against these defendants with prejudice.

While the Ninth Circuit has yet to affirm the district courts’ application of agency law to producers of equipment used to violate the TCPA, other districts in the circuit are likely to follow this approach. Since companies that utilize autodialer systems and contact lists, for example, so rarely (if ever) do so to benefit the *producer* of such equipment, this growing line of authority provides a useful defense for manufacturers of telemarketing equipment who are dragged into TCPA litigation against their customers.

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