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A Radical Change to Ratification: Key Takeaways from Henderson v. United Student Aid Funds, Inc.

Minding Your Business on **April 22, 2019**

On Friday, March 22, a split panel of the Ninth Circuit Court of Appeals found that a company with no direct contractual relationship with independent contractors could be found vicariously liable for the actions of those contractors in a class action suit. The majority held that ratification may create an agency relationship when none existed before, and that a reasonable jury could have found the defendant, owners of billions of dollars in student loan debt, vicariously liable for violations of third party debt collectors. The holding in *Henderson* potentially could have widespread agency law ramifications, especially when it comes to Telephone Consumer Protection Act (TCPA) violations.

In *Henderson*, the plaintiff alleged that debt collectors violated the TCPA by calling her on a phone number she had not provided in connection with her student loans nor had consented to be called on. She alleged that not only were the debt collectors liable, but so too were the loan servicing company, Navient, as well as the loan owner, USA Funds.

USA Funds had entered into an agreement with Navient to handle student loan servicing and debt collection. Navient then hired the debt collectors to handle most aspects of collection and repayment of the loans. Although USA Funds had no contractual relationship or any day to day dealings with the debt collectors, the plaintiff argued that USA Funds was also liable because it had a principal-agent relationship with the debt collectors that Navient had hired. The district court granted summary judgment in favor of USA Funds because of the lack of a contractual relationship between USA Funds and the debt collection agencies. However, the Ninth Circuit reversed, finding that there were issues of material fact as to whether USA Funds had ratified the debt collectors' calling practices.

Judge D.W. Nelson wrote for the majority that because the debt collection agencies hired by Naviant "negotiated, deferred, and took payments on USA Funds' behalf," and USA Funds accepted loan payments collected by these collectors, USA Funds *could have* ratified the debt collectors' actions, even without any prior relationship. "The focal point of ratification is an observable indication that a principal has exercised an explicit or implicit choice to consent to the purported agent's acts." The Court then turned to whether USA Funds had sufficient knowledge of material facts while it received the benefits of their actions – namely, loan payments – to ratify the actions of the debt collectors.

Crucially, the Court found evidence that USA Funds consented to the debt collectors' calling practices, and therefore held that a reasonable jury could find that USA Funds ratified their practices by not taking affirmative steps to prevent TCPA violations. Because USA Funds conducted audits of Navient's practices, which determined debt collectors might have violated the TCPA, the Court held that there was a triable issue of fact as to USA Funds' actual knowledge of the violations. The Court then concluded that USA Funds failed to take steps to correct any potential wrongdoing, which the Court held constituted sufficient information from which a jury could find liability. The Court further held that even if there were insufficient facts to show that USA Funds had actual knowledge of the TCPA violations, USA Funds had enough information to require further investigation and therefore also could have ratified the debt collectors' actions through willful ignorance.

The holding in *Henderson* has serious ramifications for corporations hoping to avoid liability for actions of third parties, particularly within the debt-collection space. The Court details steps that USA Funds could have taken to avoid potential liability, all of which require significantly stronger oversight of third parties by loan holders or, thinking more broadly, corporations that outsource parts of their business. Writing in dissent, Judge Bybee noted that the majority's holding comes close to requiring strict liability for TCPA violations.

In order to protect from potential liability, especially in the Ninth Circuit and especially with respect to the TCPA, companies should give more thought about how to ensure that those purportedly acting on their behalf are not violating the law. For instance, companies may want to put in place policies and procedures for entities to which they outsource business, and should set performance or operational standards to ensure that subcontractors are complying as well. Forwarding complaints regarding subcontractors' actions to the contracting party (*e.g.*, USA Funds had forwarded complaints it received to Navient) is no longer enough to prevent TCPA liability; companies must take affirmative steps to monitor third parties along the chain of contractors and subcontractors, even when they haven't contracted with the party themselves.

Time will tell whether this extension of agency liability by ratification extends beyond the TCPA violations and the debt-collection space. For now, however, corporations taking these types of steps may help defend against plaintiffs' arguments that they are liable by acquiescing to third party wrongdoing.

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