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Ninth Circuit Adopts Broad Definition of ATDS

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A unanimous three-judge panel of the U.S. Court of Appeals for the Ninth Circuit on Thursday handed the plaintiffs' bar a resounding win. The panel held that the Telephone Consumer Protection Act's (TCPA) statutory definition of an automatic telephone dialing system (ATDS) includes telephone equipment that can automatically dial phone numbers stored in a list, rather than just phone numbers that the equipment randomly or sequentially generates. See *Marks v. Crunch San Diego*, Appeal 14-56834. This decision departs sharply from the post-*ACA International* decisions by the U.S. Courts of Appeals for the Second and Third Circuits, which had narrowed the definition of an ATDS.

In *Marks,* the plaintiff sued Crunch Fitness after he received three text messages from the gym sent through its Textmunication system. The district court had granted summary judgment to Crunch Fitness after finding that the Textmunication system could not be an ATDS because it lacked a random or sequential number generator and required human intervention to input the numbers into the platform. (See our prior alert on this case here.) The plaintiff, a representative of a putative class, appealed. While the appeal was pending, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in *ACA International*. (Prior alert here.)

The Ninth Circuit agreed with earlier cases interpreting the D.C. Circuit's opinion in ACA International to have overruled all prior FCC guidance on the definition of an ATDS and held that "only the statutory definition of ATDS as set forth by Congress in 1991 remains." Based upon the remaining statutory definition, the court considered two questions: (1) "whether, in order to be an ATDS, a device must dial numbers generated by a random or sequential number generator or if a device can be an ATDS if it merely dials numbers from a stored list"; and (2) "to what extent the device must function without human intervention in order to qualify as an ATDS."

As to the first question, the Ninth Circuit concluded that the statutory definition of an ATDS was "ambiguous on its face." It thus examined the "context and structure of the statutory scheme" to conclude that Congress intended to regulate devices that make automatic calls, including automatic calls dialed from lists of recipients. As support, the Ninth Circuit pointed to other TCPA provisions that allowed an ATDS to call selected numbers, reasoning that a device would have to dial from a list of phone numbers to take advantage of such provisions. The court also noted that Congress amended the TCPA in 2015 but left the definition of an ATDS untouched, even after the FCC had interpreted the definition to include devices that could dial numbers from a stored list. Accordingly, the Ninth Circuit held that an ATDS refers to equipment that "has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers."

As to the second question, the Ninth Circuit rejected the argument that a device must operate without any human intervention whatsoever. It explained that the definition's reference to an "*automatic* telephone *dialing* system" meant that Congress was targeting equipment that automatically *dialed* phone numbers, not equipment that operated without any human involvement. Thus, a device that automatically dials from a list that is loaded into the dialing device may qualify as an ATDS even though humans were used to input the phone numbers into the device.

Based on its interpretation of the definition of an ATDS, the Ninth Circuit held that the evidence in *Marks* (specifically, evidence that the equipment at issue stored and dialed numbers automatically to send text messages as part of a campaign) created a genuine issue of material fact sufficient to withstand summary judgment. It therefore declined to address the question of whether dialing equipment must have the current or potential capacity to perform the required ATDS functions.

The *Marks* court's ruling creates a circuit split in view of the Third Circuit's decision in *Dominguez,* which the Ninth Circuit criticized as "unpersuasive." It remains to be seen whether Crunch Fitness will seek certiorari in the U.S. Supreme Court. Also unknown is whether the FCC's pending public notice proceeding—from which further guidance on the ATDS definition is anticipated—will clash with the *Marks* ruling.

While companies had hoped the decision would slow the flood of TCPA litigation by narrowing the definition of an ATDS, the *Marks* decision instead makes the Ninth Circuit a magnet for these cases by retaining essentially the same broad definition in effect before the *ACA International* decision. The good news is that the case creates a clear circuit split that hopefully will result in the Supreme Court deciding the issue once and for all. In the meantime, strong TCPA compliance procedures, as well as contractual consent and arbitration provisions, remain important tools for avoiding potential TCPA exposure.

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