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Sleeping Giants: Ninth Circuit Panel of Bush Appointees Seemed Unlikely to Deliver Stunning Expansion of TCPA in Marks

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I'm sure for the many of you, a good amount of your weekend was spent digesting the much anticipated *Marks v. Crunch* ruling. As we continue to provide our analysis of the impacts of the ruling, we first explore the *Marks* three judge unanimous panel to see if we could have, or should have, been able to predict the outcome of *Marks*.

The *Marks* panel consisted of Consuelo M. Callahan, Judge Carlos T. Bea and Judge Sandra S. Ikuta, all appointees of President George W. Bush. The opinion was written by Judge Ikuta.

As the Baron broke down for us, the *Marks* court parsed the TCPA, finding the definition of an ATDS ambiguous on its face and then relied on "canons of construction, legislative history, and the statue's overall purpose to illuminate Congress's intent," in formulating a new definition of ATDS.

First, some interesting background on the *Marks* panel of judges.

Judge Ikuta took the bench in 2006. She is a frequent dissent from denial author and taken as a whole, Ikuta's opinions do not reflect any strong ideology. She is a former O'Melveny & Myers litigator where she primarily assisted clients in environmental compliance. She is referred to as a "moderate conservative" and has written many opinions where she dissents against the government, coming to her own independent conclusions. Based on the opinions we've reviewed, Judge Ikuta doesn't seem to have a preference for plaintiffs or defendants. She also seems to be deferential to federal agencies. *CallerID4u, Inc. v. MCI Communications Services Inc.* 880 F.3d 1048 (9th. Cir. 2018) (opinion for the court) (explaining that company was subject to FCC rate regulations); *Telesaurus VPC, LLC v. Power 623 F.3d 99810* (9th. Cir. 2010) (opinion for the court) (giving deference to the FCC's issuance of a license). Other than the *Marks* case, Ikuta has only sat on panel for 2 other TCPA matters. *Rahmany v. T-Mobile USA Inc. 717 Fed.Appx.* 752 (9th. Cir. 2008) (reversal of district court's order granting defendant's motion to compel arbitration in TCPA case); *Kristensen v. Credit Payment Services*Inc.879 F.3d 1010 (9th. Cir. 2008) (opinion for the majority) (affirming grant of summary judgment that defendants did not ratify acts of non-party violating the TCPA in a class action matter).

Judge Callahan was appointed in 2003 and previously spent a decade as a deputy district attorney

where she specialized in prosecution of child abuse and sexual assault cases. Callahan also has only judged two matters involving the TCPA. *Baird v. Sabre, Inc.* 636 Fed.Appx. 715 (9th. Cir. 2016) (member of unanimous majority) (affirming FCC's interpretation of "prior express consent" and The Hobbs Act's exclusive jurisdiction to determine the FCC's final orders); *Gannon v. Network Telephone Services, Inc.,* 628 Fed.Appx. 551 (9th. Cir. 2016) (affirming denial of class certification in TCPA case). Again, Justice Callahan's previous opinions also do not show any glaring preference to defendants or plaintiffs.

Judge Bea was appointed to the Ninth Circuit in 2003 and previously was a civil litigation trial attorney and served as a judge of the San Francisco Superior Court. Bea entered unmarked territory with *Marks* as his experience with TCPA matters is limited to the *Marks* action, though he presided over the *Robins v. Spokeo* matter, where there the Ninth Circuit took up Article III standing issues in a FCRA matter.

While none of the Judges have written any decisions directly reflecting their views of the TCPA or indicating any leanings on any of the issues decided in *Marks*, each have issued opinions that give insights into their judicial philosophy on statutory construction, consistent with the *Marks* opinion.

For instance, several of Judge Ikuta's opinions have close parallels to how the *Marks*court approached the statutory construction of an ATDS. *Stoner v. Santa Clara County Office of Educ.* 502 F.3d 1116225 (9th. Cir. 2007) (opinion for the majority) (looking at the "canons of statutory construction" to interpret an undefined term within a statute); *Planes v. Holder* 686 F.3d 1033 (9th. Cir. 2012) (opinion for the majority) (ruling that when "the plain language of the statute is clear, it is improper to look for hidden meanings within the legislative history, much less within the silences of the legislative history.") Though Ikuta has on several occasions, found statutes to be ambiguous, she has also several times found the plain language of statutes to be clear.

Similarly, Judge Callahan, has interpreted statutes to be straightforward while finding others to be ambiguous. *International Brotherhood of Teamsters v. U.S. Department of Transportation* 861 F.3d 944 (9th. Cir. 2017) (finding that the plain language of the statute was straight forward, leaving nothing else for the court to interpret); *Mendoza v. Nordstrom, Inc.* 778 F.3d 834 (9th. Cir. 2015) (recognizing that statutory interpretation begins with text and only when the statute is ambiguous, should courts look at legislative history).

Judge Bea has also opined a mix of cases. *Fair Housing Council of InSan Fernando Valley v. Roommates.Com*, LLC 521 F.3d 115736 (9th. Cir. 2008) (member of dissenting opinion) (finding a statute to have clear terms and noting that the majority should have examined the statute's terms and its express findings first, not first the legislative history); *State of California v. Iipay Nation of Santa Ysabel* 898 F.3d 960 (9th. Cir. 2018) (opinion of the court) (finding terms of a statute to be ambiguous and reviewing the statutory framework of the statute to interpret ambiguous provisions).

As a whole, the *Marks* panel's previous decisions could not have revealed any potential implications before the *Marks* ruling. The Judges not only have limited experience in TCPA matters, but their opinions supported varying findings – sometimes finding statutes to be ambiguous and sometimes finding statutes to be clear. The only common thread we can see amongst the panel is their judicial philosophy that only when a statute is ambiguous, should the court look at extrinsic material outside the plain language of the statute – as it certainly did in *Marks* when constructing its own definition of an ATDS.

At bottom, the *Marks* panel appeared to be a good draw for the defendant—middle-of-the-road, if not

conservative, judges with a history of thoughtful and intellectually-honest rulings. *Marks* goes to show, therefore, that predicting an ultimate decision of an appellate court is a fool's game in TCPALand. That said, Judge Callahan's ruling in *Baird* respecting the impact of The Hobbs Act is an important one for district courts to keep in mind. Anyone have a prediction on whether district courts in the Ninth Circuit will defer to the FCC over *Marks* after the Commission's long awaited declaratory ruling is issued next month*ish*?

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