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TCPA Alert – What's that Crunch-ing sound? Reason being destroyed in the Ninth Circuit

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Ever since the D.C. Circuit's ruling six months ago in *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), which invalidated the FCC's interpretation of an Automatic Telephone Dialing System ("ATDS"), a consensus had been growing. Led by the Third Circuit in *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018), many courts nationwide have found that the *ACA* opinion invalidates all of the FCC's previous ATDS definitions and stands for the proposition that an ATDS is a system that uses a random or sequential number generator. But because things can never be that easy in the TCPA space, the Ninth Circuit created a circuit split last week with its decision in *Marks v. Crunch San Diego, LLC*, 2018 U.S. App. LEXIS 26883 (9th Cir. Sept. 20, 2018).

In *Crunch*, the Ninth Circuit overturned summary judgment in favor of the defendant, holding that the statutory definition of an ATDS includes a device that stores telephone numbers to be called, regardless of whether those numbers have been generated by a random or sequential number generator, and remanded the case for further proceedings. The court concluded that "[a]lthough Congress focused on regulating the use of equipment that dialed blocks of sequential or randomly generated numbers—a common technology at that time—language in the statute indicates that equipment that made automatic calls from lists of recipients was also covered by the TCPA." *Id.* at *23. In so holding, the Ninth Circuit somehow found that "the statutory text is ambiguous on its face." *Id*. But the TCPA clearly states that an ATDS is a system that involves "using a random or sequential number generator." 47 U.S.C. 227(a)(1)(A). Contrary to the clear statutory language, the Ninth Circuit chose to invent a definition from whole cloth, finding that definition includes "equipment that made automatic calls from lists of recipients" despite the fact that those words appear nowhere in the statute.

This decision is less than stellar news for any TCPA defendants whose hopes for victory (or at least clarity) had been buoyed by *ACA, Dominguez* and their progeny. But the ATDS issue now seems poised for consideration by the Supreme Court, and the TCPA defendants have the better side of the argument. The Ninth Circuit should have deferred to the guidance of the D.C. Circuit in *ACA*, which (under the Hobbs Act) is the Court with authority to rule on the propriety of the FCC's ATDS interpretation. The D.C. Circuit suggested that it would support a definition of an ATDS limited to "a device that can generate random or sequential numbers to be dialed." *ACA,* 885 F. 3d at 696. The

Third Circuit in *Dominguez* followed suit, and the Ninth Circuit should have done so as well. The problem with the Ninth Circuit's approach is that it is substantially overbroad — read literally, the Ninth Circuit's definition would include all smartphones in the definition of an ATDS. Such a result not only is absurd, but could not possibly have been what Congress intended, given that smartphones did not even exist when the TCPA was enacted in 1992. *See id.* at 692 ("The Commission's understanding would appear to subject ordinary calls from any conventional smartphone to the Act's coverage, an unreasonably expansive interpretation of the statute.").

There are some silver linings hidden in the *Crunch* decision. The Ninth Circuit correctly found that the *ACA* decision invalidated not just the 2015 FCC order in question, but all FCC orders before it on the ATDS issue. The court held that "[b]ecause the D.C. Circuit vacated the FCC's interpretation of what sort of device qualified as an ATDS, only the statutory definition of ATDS as set forth by Congress in 1991 remains." *Crunch*, 2018 U.S. App. LEXIS 26883 at *20. Additionally, the Ninth Circuit "decline[d to] reach the question whether the device needs to have the current capacity to perform the required functions or just the potential capacity to do so." *Id.* at FN 9. Given the court's incredibly broad definition of an ATDS, this is probably a good thing for defendants.

We will continue to watch the *Crunch* case — and the flood of activity sure to follow in the Ninth Circuit and before the FCC — with great interest. A motion for *en banc* review in *Crunch* and/or a petition for certiorari to the Supreme Court seem likely.

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