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TCPA Bites Again: Court Trebles TCPA Damages Against Debt Collector Awarding Nearly $300k on Summary Judgment

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Even as courts are increasingly moving toward applying a narrow ATDS definition, the TCPA remains extremely dangerous—particularly in the Ninth Circuit where *Marks* holds sway. You won't find many cases that better prove the point then *Lamkin v. Portfolio Recovery Assocs*., No. 2:18-cv-03071 WBS KJN, 2019 U.S. Dist. LEXIS 165820 (E.D. Cal. Sept. 25, 2019) where a court just trebled damages against a debt collector and entered a $298.5k judgment—at the summary judgment stage!

The facts in *Lamkin* are, unfortunately, all too familiar after the huge judgment entered against Rash Curtis & Assoc. recently. The collector in *Lamkin* was apparently calling numbers obtained via skip trace via a dialer. Indeed, there was no dispute the Plaintiff did not provide his number directly to the caller and that the Defendant obtained the number "only through a third-party credit report." The dialer at issue—a popular brand of predictive dialer—was stipulated to have the ability to store numbers and dial them from a list.

Knowing that *Marks* cast a huge shadow over the case, the Defendant argued—rather creatively—that *Marks* was not actually binding case law because it conflicted with *Satterfield* –another Ninth Circuit case—and the earlier decision must be adhered to.

In *Satterfield* the Ninth Circuit had, indeed, found that the TCPA's ATDS definition was unambiguous and required the use of a random or sequential number generator—a holding entirely at odds with the determination of the *Marks* panel—so the argument has merit. Nonetheless, the *Lamkin* court rejected the approach concluding there was no actual conflict and cabined *Satterfield* as a decision addressing "capacity"; a rather dubious conclusion but one expressly invited by a footnote in the *Marks* ruling itself. The *Lamkin* court also notes, however, that the Ninth Circuit's subsequent decision in *Duguid* relied on *Marks* in a manner confirming that *Marks* is valid case law in the Circuit.

Since there was no dispute that the dialer called automatically and from a list, the Court ruled that Defendant used an ATDS for TCPA purposes. Moreover, there being no dispute that the calls were made without consent and to a cell phone the Court concluded that judgment in Plaintiff's favor was appropriately entered at the summary judgment stage.

The only issue left to address was whether the court would treble damages on a finding of willfulness. The Court identified the standard as whether the Defendant knew it was calling using an ATDS and

without consent. The Court was unmoved that the actions were not willful owing to the fact that Defendant stopped calling when Plaintiff asked for the calls to cease. In the court's view, no reasonable juror could conclude that Defendant believed it had consent to begin with since it had never sought consent before commencing with the calls at issue. The Court likewise found that the Defendant knew it was calling using a predictive dialer—and was unmoved that the Defendant was unaware the device qualified as an ATDS. In the Court's view the calls at issue were placed during a timeframe when predictive dialers were covered by the FCC's binding rulings. Although those rulings were later set aside that did not—in the court' view—excuse any erroneous belief that calls made using such a dialer do not trigger TCPA coverage.

This last piece of *Lamkin* is particularly fascinating. The TCPA is an extremely vague statute and it is very likely that callers do not know whether or not the equipment they use qualifies as an ATDS. The Court seems to recognize that a Defendant cannot be held to have willfully violated the statute without understanding that its device is an ATDS—which is undoubtedly true—but yet refused to allow a jury to determine whether or not the Defendant had a good faith belief its system did not qualify. This is intriguing, and seemingly inconsistent with the summary judgment standard. Nonetheless, the Court concluded that, as a matter of law, the Defendant had acted willfully and then exercised its discretion—it is unclear what factors the court looked to in guiding that discretion—to treble damages.

Bottom line—199 predictive dialer calls from 2008 just cost the defendant $298,500.00. Eesh.

One final note, the Plaintiff in this suit had actually opted-out of an earlier classwide TCPA settlement. It is tough for a defendant to shell out large dollars to settle claims on a classwide basis, only to see class members opt-out and pursue individual suits eclipsing six figures. Really makes one wonder how and why courts find that class treatment is "superior" to individual adjudication of TCPA claims given the large dollar recoveries that are possible for class members with valid individual claims.

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