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TCPA Coffee Break: Another California Court Follows Marks Because, Well, It has To

Article By:

Eric J. Troutman

Here's a pumpkin-spiced TCPA musing for the afternoon coffee break: I'm not sure why Defendants continue to bring motions to dismiss ATDS allegations in federal district courts in California but let me just say—it ain't working.

In *Bodie v. Lyft, Inc*., Case No.: 3:16-cv-02558-L-NLS 2019 U.S. Dist. LEXIS 172998 (S.D. Cal. Oct. 4, 2019) the Defendant moved to dismiss the complaint arguing that the ATDS allegations are conclusory and that the allegations demonstrated human intervention was needed to make the texts at issue. Following *Marks* the district court had little trouble denying the motion. In the *Bodie* court's view the SAC "clearly" alleges that an ATDS was used in this case. In the Court's view, the SAC alleges that the text platform at issue allows a user to "automatically send text messages to [a] stored list of cellular telephone numbers." That plus allegations that the platform was actually used to send "notifications en masse to a stored list of cellular telephone numbers without the need of individuals to dial the numbers" was sufficient to state a claim.

The takeaway here is that unless you have a complaint containing highly specific allegations regarding how a piece of equipment works that plainly demonstrates the dialer does not call "automatically" there is little incentive to bring a 12(b)(6) challenging ATDS allegations within the *Marks* footprint. Allegations that the system is "automatically" dialing from a list of stored numbers are probably going to pass muster at the pleadings stage.

That said, the *Marks* formulation does remain vague as to the meaning of the word "automatic" so there is room for defense victories yet—and perhaps some will come at the pleadings stage where the complaint is richly adorned with allegations demonstrating human intervention—but they will most likely come at the Rule 56 stage. Pick and choose your shots folks.

Now back to work.

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