

## Put to the Test?: TCPA Appeal of LiveVox HCI to the Ninth Circuit Could Test Limits of Marks Decision

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As TCPAWorld.com readers know well, back in September, 2018 the Ninth Circuit Court of Appeals [issued a ruling broadly interpreting the TCPA's ATDS definition to cover all equipment that calls from a list of phone numbers "automatically."](#) See *Marks v. Crunch San Diego, LLC*, 904 F. 3d 1041 (9th Cir. 2018).

While *Marks* was cutting edge at the time, case law across the country has moved past the idea that the TCPA should be interpreted broadly beyond the plain meaning of the statute's statutory meaning. Indeed *Marks* is now plainly out of step with the majority position, [which holds an ATDS must be able to randomly or sequentially generate numbers to be dialed](#). Importantly, however, the Ninth Circuit did not define "automatically" in *Marks* and left it to the district courts to assess the role "human intervention" plays in determining whether calls are made using an ATDS.

Well a new appeal seems destined to answer the open question of what sort of dialing constitutes "automatic" dialing and may offer a vehicle for the Ninth Circuit to bring its ATDS approach in line with the rest of the nation's.

We wrote about the opinion below a few weeks ago. In [Meier v. Allied Interstate, Case No.: 18-CV-1562-GPC-BGS, 2020 U.S. Dist. LEXIS 28249 \(S.D. Cal. Feb. 19, 2020\)](#) the district court granted summary judgment to the Defendant holding that the LiveVox HCI platform does not enable automatic dialing as manual intervention is required to launch each call. In the lower court's view, "the essential function of an ATDS is the capacity to dial numbers without human intervention... [h]ere, the Court finds that the LiveVox HCI system is incapable of "non-manual" dialing because it requires the intervention of clicker agents, and thus is not an ATDS." The district court also considered whether the integration between HCI and the larger Livevox platform was sufficient to convert HCI calls into automated calls and concluded it does not.

Both of these rulings are now on appeal to the Ninth Circuit Court of Appeals. At the center of the appeal is a technology platform—LiveVox HCI—and the stakes could not be higher for Live Vox or its users. Although HCI has enjoyed an impressive streak of TCPA victories—and a large number of new clients as a result—all of that could turn on a dime if the Ninth Circuit concludes HCI somehow constitutes automated dialing. And while we'd like to think the probability of such a ruling is remote—one never knows in a Circuit where three Bush-appointees re-wrote the ATDS definition a

mere 18 months ago.

While the stakes are indeed high, therefore, it seems the most likely outcome of the *Meier* appeal will be the creation of a rule regarding what it means to dial “automatically”—and hopefully HCI does not meet it. Interestingly, however, the *Meier* appeal may deliver a vehicle for the Ninth Circuit to step away from or narrow *Marks* in light of opposing ATDS opinions out of the Seventh and Eleventh Circuits.

Appellant’s Opening brief is due June 24, 2020—about the same time a ruling is expected out of SCOTUS. Interesting timing.

We’ll keep an eye on this.

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