Client Alert

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Ninth Circuit Holds TCPA Applies To Any Device That Stores And Dials Phone Numbers

The Ninth Circuit has held that the restrictions in the Telephone Consumer Protection Act (TCPA) on the use of an automatic telephone dialing system (ATDS) apply to systems that dial numbers from a list, such as predictive dialers (devices that use algorithms to dial numbers in a manner that predicts when a consumer will answer the phone and when a representative will be available to take the call). *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018). The Ninth Circuit disagreed with the Third Circuit, which held in *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018), that a device had to be able to generate random or sequential numbers in order to be an ATDS.

The Issue in *Marks*

The defendant in *Marks* allegedly sent three unconsented-to text messages to the plaintiff's cell phone. The TCPA imposes liability for unconsented-to calls or texts made to a cell phone using an ATDS, which is defined in the statute as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). The district court interpreted the statutory definition to require a device to have the capacity to generate and dial random or sequential numbers to be an ATDS. *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1292 (S.D. Cal. 2014). That court found that although the defendant's texting system could store phone numbers and text them automatically, it lacked a random or sequential number generator and did not have the potential capacity to add such a feature. *Id.* It therefore concluded that the defendant's device was not an ATDS and granted summary judgment for the defendant. *Id.*

Since 2003, the FCC has interpreted the statutory definition of an ATDS to cover devices that could dial numbers from a list, so held that the TCPA's restrictions applied to predictive dialers. But earlier this year, in *ACA Int'l. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), the DC Circuit vacated the FCC's interpretation of an ATDS, holding that the FCC's interpretation "fail[ed] to satisfy the requirement of reasoned decisionmaking." *Id.* at 703. With *ACA* having vacated the FCC's interpretation, the issue on appeal in *Marks* was the correct interpretation of the statute itself: did the statute require that to be an ATDS a device had to be able to generate and dial random or sequential numbers, or was it enough that the device could dial numbers from a list?

The Holding in *Marks*

The Ninth Circuit found that the statutory definition of an ATDS is ambiguous, since it could be interpreted either to require that a device generate random or sequential numbers to be an ATDS or that a device is an ATDS if it can dial from a list, even if it cannot generate random or sequential numbers. 2018 WL 4495553, at *8. The court adopted the latter interpretation, finding 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.* In support of that interpretation the court cited the TCPA provision allowing calls from ATDS "made with the prior express consent of the called party," which the court held could only be applicable if the calls were made from a list, rather than a block of random or sequential numbers. *Id.* The court further held that Congress's failure to amend the TCPA to

overrule the FCC's 2003 interpretation of an ATDS to include predictive dialers "suggests Congress gave [that] interpretation its tacit approval." *Id.* The court thus held that the statutory definition of an ATDS is not limited to devices that can call numbers produced by a "random or sequential number generator," but also includes any device that can dial stored numbers automatically: "[W]e read § 227(a)(1) to provide that the term automatic telephone dialing system means equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers." *Id.* at *9.[1]

The Effects of *Marks*

From 2003 until *ACA* was decided last March, courts were bound by the FCC's 2003 interpretation under which predictive dialers are ATDSs. Although *ACA* vacated that interpretation, *Marks* has restored the pre-*ACA* status of predictive dialers in the Ninth Circuit by holding that a device is an ATDS as long as it can call from a list of numbers, even if it cannot generate random or sequential numbers. *Marks*'s interpretation of the statutory definition of an ATDS is not binding outside the Ninth Circuit, but will likely be considered a significant authority by courts in other jurisdictions.

The Ninth Circuit did not address the "capacity" issue: what the TCPA means when it states that to be an ATDS a device must "*have the capacity*" "to store or produce telephone numbers to be called, using a random or sequential number generator." In *ACA*, the DC Circuit rejected the FCC's interpretation of "capacity"—that a device is an ATDS if it can be reconfigured to generate and dial random or sequential numbers—holding that that interpretation was "an unreasonably, and impermissibly, expansive one," since it would imply that every smartphone would be an ATDS and every unconsented-to call to a cell phone number from a smartphone would give rise to TCPA liability. 885 F.3d at 700; *accord King v. Time Warner Cable Inc.*, 894 F.3d 473, 478 (2d Cir. 2018). But the Ninth Circuit's holding opens the door wide to the very conclusion that the DC Circuit held was absurd, for smartphones have the present capacity to store and dial numbers.

Finally, the Ninth Circuit rejected the Third Circuit's conclusion in *Dominguez* that a device could qualify as an ATDS only if it could generate random or sequential numbers. 2018 WL 4495553, at *9 n.8 (rejecting as an "unreasoned assumption" the Third Circuit's conclusion that an ATDS must be able to "generat[e] random or sequential telephone numbers and dial[] those numbers"). *Marks* thereby creates a circuit split that the Supreme Court may ultimately resolve.

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[1] The Ninth Circuit assumed that if the FCC's 2003 order had been vacated, it had to interpret the statute itself. The court did not address the FCC's 1992 order in which the FCC expressly found that the TCPA's restrictions did not apply to debt-collection calls "because such calls are not autodialer calls (i.e., dialed using a random or sequential number generator)." In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 7 F.C.C. Rcd. 8752, 8773 (1992). That 1992 order was not vacated in *ACA*, and so under the Hobbs Act would be binding on even the court in *Marks*.