DREHER TOMKIES LLP ALERT

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MARKS V. CRUNCH SAN DIEGO LLC: WHO KNOWS WHAT AN AUTODIALER IS?

On September 20th, the U.S. Court of Appeals for the Ninth Circuit released a controversial opinion that held that the definition of "automatic telephone dialing systems" ("ATDS") under the Telephone Consumer Protection Act ("TCPA") includes devices with the capacity to dial stored numbers automatically. *Marks v. Crunch San Diego LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018). The Ninth Circuit determined that telephone equipment does not have to have the capacity to generate random or sequential numbers to qualify as an ATDS. The court also rejected the assertion that equipment must operate without any human intervention whatsoever to qualify as an ATDS. Accordingly, the Ninth Circuit interpreted the definition of ATDS under the TCPA as follows:

> 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 automatically (even if the system must be turned on or triggered by a person).

How did the court settle on this interpretation? First, the Ninth Circuit found that the Federal Communication Commission's 2015 order interpreting the definition of ATDS was not binding on the court after the D.C. Circuit court set aside the order in *ACA International v FCC*.

Since the FCC's interpretation was no longer binding, the Ninth Circuit interpreted the statutory definition of ATDS under the TCPA anew. Specifically, the court focused on the functions that equipment must have the capacity to perform. After "struggling" with the statutory language and finding the language ambiguous, the court turned its attention to the context and structure of the statutory scheme to determined the intended scope of the definition of ATDS.

According to the court, the TCPA indicates that equipment that makes automatic calls from lists of recipients is covered by the TCPA. The court supported its conclusion by citing provisions in the TCPA that anticipate ATDS calling selected numbers, including the exception to the ATDS prohibition for calling or sending text messages to phone numbers with the prior express consent of the called party. To operate within this exception, the court reasoned that an ATDS would have to dial from a list of phone numbers of consenting individuals instead of dialing a block of random or sequential numbers.

The court rejected the defendant's argument that a device must operate without any human intervention whatsoever to be an ATDS. In enacting the TCPA, Congress was targeting equipment that could engage in automatic dialing not equipment that operated without any human oversight or control, the court noted. The court said that common sense indicates that some kind of human intervention is required before an autodialer can work. Human intervention could be simply turning on the machine.

The Marks case involves a web-based marketing platform designed to send promotional text messages to a list of stored telephone numbers. The defendant's employees logged into the platform, selected the recipient phone numbers, generated the content of the marketing message and set the date and time the message would be sent. Then, the platform sent text messages automatically to the selected phone numbers at the selected time. Applying the Ninth Circuit's interpretation of ATDS to the device in this case, the court found that the platform could qualify as an ATDS even though the platform lacked a random or sequential number generator because the equipment stored numbers and dialed the numbers automatically to send text messages to a stored list of phone numbers.

The *Marks* case is binding in the Ninth Circuit's jurisdiction, which covers Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon and Washington. In a footnote, the Ninth Circuit rejected the Third Circuit's "unreasoned assumption" in *Dominguez ex rel. Himself v. Yahoo, Inc.*, that a device must be able to generate random or sequential numbers to qualify as an ATDS. The *Marks* case creates a circuit court split that could ultimately be resolved by the U.S. Supreme Court. ❑

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