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WILL THE U.S. SUPREME COURT HEAR A CASE ON THE TCPA'S DEFINITION OF "AUTODIALER"?

Crunch San Diego LLC ("Crunch") has filed a petition with the Supreme Court of the United States asking the court to review a controversial decision issued by the U.S. Court of Appeals for the Ninth Circuit regarding the definition of "automatic telephone dialing system" ("ATDS") under the federal Telephone Consumer Protection Act ("TCPA").

In *Marks v. Crunch San Diego LLC*, the Ninth Circuit held that telephone equipment is not required to have the capacity to generate telephone numbers randomly or sequentially to qualify as an ATDS. Rather, equipment that stores numbers and dials the stored numbers automatically could qualify as an ATDS. The communication system at issue in *Crunch* has no present capacity to generate numbers randomly or sequentially and to dial such numbers, which Crunch argued places the system outside of the definition of ATDS. See our ALERT on Sept. 27, 2018 for a summary of the case.

Crunch listed three reasons why the U.S. Supreme Court should grant its petition to review the case:

First, the Ninth Circuit's decision conflicts with the Third Circuit's ruling in *Dominguez v. Yahoo, Inc.* and is in "stark tension" with the D.C. Circuit's opinion in *ACA International v. Federal Communication Commission* ("FCC"). According to the petition, the Third Circuit held in *Dominguez* that equipment must have the capacity to (i) generate telephone numbers randomly or sequentially and (ii) dial the numbers to be deemed an ATDS. In its opinion, the Ninth Circuit described the Third Circuit's ruling as "unpersuasive" and based on an "unreasoned assumption." Crunch also argued that the Ninth Circuit's ATDS interpretation contradicts the interpretative limitation set forth in *ACA International*. In that case, the D.C. Circuit invalidated the FCC's 2015 interpretation of ATDS and held that ATDS cannot be interpreted to render every smartphone an ATDS subject to the TCPA. Crunch noted that smartphones could qualify as ATDSs under the Ninth Circuit's decision to the extent that the smartphone has the capacity to make automatic calls from lists of recipients. The petition asked the court to address a circuit split.

Second, the Ninth Circuit's decision contradicts the plain language and the purpose of the TCPA. In its opinion, the Ninth

Circuit admitted that it "struggled" with the statutory definition of ATDS finding the language ambiguous. The petition proffered that the Ninth Circuit reconstructed the plain language definition of ATDS in its ruling. Using statutory construction and basic rules of grammar and punctuation, ATDS should be interpreted, according to Crunch, to require equipment to have the capacity to generate numbers randomly or sequentially. Crunch also argued that the Ninth Circuit's decision extends far beyond the purpose of the TCPA because Congress passed the TCPA to regulate a specific type of then-prevalent technology — automatic block-dialing machines, not commonplace smartphones.

Finally, the petition described the issue in *Crunch* as a question of exceptional importance that the court can resolve definitively. The petition cited statistics on TCPA litigation volume to show the importance of the issue. The petition noted that the FCC has sought to establish the contours of the ATDS definition since 1992. The FCC's most recent effort, the 2015 interpretation, was found to fall short of reasoned decisionmaking by the D.C. Circuit in *ACA International*. The petition stated "this is not a case where the Court should sit idly awaiting further agency action."

But sit idly, the court might. Crunch's petition failed to mention the FCC's October 2018 request for public comment on how the FCC should interpret the definition of ATDS after *Crunch*. See our ALERT on Oct. 8, 2018. Undoubtedly, conflicting court decisions and ambiguity exist, but will the Supreme Court give the FCC another chance to provide guidance on the definition of ATDS by denying Crunch's petition? We will keep you updated. □

✧ *Mike Tomkies and Susan Seaman*

Darrell L. Dreher
ddreher@dtlaw.com

Elizabeth L. Anstaett
eanstaett@dtlaw.com

Emily C. Cellier
ecellier@dtlaw.com

Susan L. Ostrander
sostrander@dtlaw.com

2750 HUNTINGTON CENTER
41 S. HIGH STREET
COLUMBUS, OHIO 43215
TELEPHONE: (614) 628-8000 FACSIMILE: (614) 628-1600
WWW.DTLAW.COM

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Michael C. Tomkies
mtomkies@dtlaw.com

Susan M. Seaman
sseaman@dtlaw.com

Lindsay P. Valentine
lvalentine@dtlaw.com

Judith M. Scheiderer
jscheiderer@dtlaw.com

Robin R. De Leo
robin@deher-la.com