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Ninth Circuit Adds Its Two Cents to Piggy Bank of TCPA Autodialer Interpretations

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People trying to understand the Telephone Consumer Protection Act's autodialer standard have been repeatedly knocked around by 2018 judicial developments. The tumult began in March, when the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in *ACA International v. Federal Communications Commission*. That decision vacated key elements of the Federal Communications Commission's 2015 guidance, including its interpretation of the TCPA's definition of "autodialer." Since then, federal courts nationwide have struggled to apply the *ACA International* decision to the endless wave of TCPA litigation. Key post-*ACA International* questions include: (1) Is the *ACA International* decision binding everywhere?; (2) When the *ACA International* decision vacated the FCC's 2015 guidance on the TCPA autodialer standard, what did that mean for the FCC's related guidance from 2003, 2008, and 2012?; and (3) If a dialing system is not capable of random or sequential dialing, can it still be regulated as an autodialer?

Dealers, finance companies, and anyone else using technology to add efficiency to calling and texting campaigns need to track how courts in states where they do business are answering these questions. On September 20, 2018, companies operating on the West Coast received important new guidance from the U.S. Court of Appeals for the Ninth Circuit. Companies operating elsewhere need to see how their courts respond to the Ninth Circuit's analysis in *Marks v. Crunch San Diego, LLC*, where the appellate court found that it was bound to follow *ACA International*, that the autodialer standard is now set by the original statutory definition, and that even equipment that can dial automatically from a stored list can be regulated as an autodialer.

Crunch San Diego, LLC, operated a gym called Crunch Fitness. Jordan Marks provided his cell phone number to Crunch, and the gym subsequently sent him three marketing text messages. Marks, claiming that his phone carrier charged him for each incoming text, filed a putative class action complaint against Crunch, alleging that its messages used an autodialer and lacked the consent required by the TCPA. The trial court granted Crunch's summary judgment motion, finding as a matter of law that the gym's text message delivery system was not a TCPA autodialer because it could not dial numbers randomly or sequentially.

Marks appealed, and the Ninth Circuit reversed. With respect to the three key issues listed above, the appellate court resolved the first one in a manner consistent with the

strong majority view: given the procedural posture of the *ACA International* matter, that decision is binding on courts nationwide. This meant that the appellate court was obligated to apply the *ACA International* court's decision to vacate the FCC's 2015 autodialer guidance. Second, the appellate court concluded that the *ACA International* decision vacated the FCC's related guidance from 2003, 2008, and 2012, in addition to the 2015 iteration. Courts have been starkly split on this issue. Some have limited the scope of the *ACA International* decision, leaving in place the FCC's earlier guidance. Under this approach, the autodialer standard can be applied based on whether a dialing system has the capacity to dial without human intervention, and predictive dialers are clearly regulated as autodialers. Other courts have concluded that, as a logical matter, *ACA International* vacated prior FCC guidance with the same fatal reasoning flaws as the 2015 guidance. Under this approach, courts must return to the TCPA's original statutory definition of "autodialer."

Curiously, the appellate court adopted the latter approach, which typically leads to a narrower interpretation of the autodialer standard, but the appellate court then crafted an expansive interpretation of the original statutory definition. The original definition is limited to equipment with the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers." Prior to the appellate court's *Marks* decision, courts had generally interpreted this definition to mean that equipment must have the ability to generate and dial numbers randomly or sequentially to satisfy the "autodialer" definition. However, the appellate court reasoned that equipment could be regulated as an autodialer if it has the capacity to store numbers to be called and to dial such numbers automatically, even in the absence of a random or sequential number generator. Under this interpretation, predictive dialers are likely regulated as autodialers, even under the original statutory definition, because they can automatically dial numbers from a stored list. This is also the case for text messaging systems with automatic delivery functionality similar to predictive dialers.

One big unknown arising from the appellate court's *Marks* decision is the fate of preview dialing and "click-to-dial" systems. Such systems can be distinguished from predictive dialers because they require human intervention to initiate each call or text. The *Marks* decision created an autodialer standard that applies to equipment that can store numbers to be called and dial numbers automatically, "even if the system must be . . . triggered by a person." The *Marks* court did not explain what it meant by "automatically," "dial," or "triggered by a person." Crunch San Diego's system did not raise these issues, and Crunch did not dispute that its system could dial automatically from a stored list.

"Click-to-dial" systems store numbers to be called, but are they capable of dialing automatically? If so, does the employee's involvement merely "trigger" the system's automatic dialing? According to the Ninth Circuit, a person's "triggering" can be consistent with an autodialer. Or is the employee's role so central to the system's functionality that the "autodialer" definition is no longer satisfied?

In other courts in other circuits, support has been building for the position that "click-to-dial" systems are not autodialers. Following the *Marks* decision, "click-to-dial" system users in the Ninth Circuit or calling into the Ninth Circuit are facing much more

uncertainty today than existed prior to Marks.

Marks v. Crunch San Diego, LLC, 2018 U.S. App. LEXIS 26883 (9th Cir. (S.D. Cal.) September 20, 2018).

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