Blogs
January 02, 2019

The Ninth Circuit recently denied a motion for rehearing en banc in *Marks v. Crunch*, leaving in place a Ninth Circuit decision that broadly defines "automated telephone dialing system" ("autodialer") under the Telephone Consumer Protection Act ("TCPA").

The decision conflicts with decisions from other circuits. And in the New Year, the FCC is expected to issue its own new interpretation of the term "autodialer" under the TCPA. Amidst this uncertainty, companies should proceed cautiously when reaching consumers by phone or text, and should consider how to minimize risk with respect to the TCPA's autodialer provisions. Jordan Marks signed up for a gym membership with Crunch Fitness in 2012. After joining the gym, he allegedly received three text messages from Crunch over a period of eleven months. He sued Crunch under the TCPA, alleging that Crunch used an autodialer to call him without his prior

express consent and seeking to represent a putative class of other similarly-situated individuals. The district court granted summary judgment in favor of Crunch claiming that the Textmunication system that Crunch used to send the text messages was not an autodialer. Marks appealed. Earlier this year, the Ninth Circuit reversed the district court, interpreting the term "automated telephone dialing system" to encompass not only devices with the capacity to call numbers produced by a "random or sequential number generator," as the statute reads, but also devices that merely have "the capacity to dial stored numbers automatically." The Ninth Circuit found that because Crunch's texting system "stores numbers and dials them automatically to send text messages to a stored list of phone numbers as part of scheduled campaigns," that was enough to survive summary judgment and for the lawsuit to proceed. Crunch petitioned for a rehearing en banc and was joined by two amici. However, the Ninth Circuit denied the motion. Crunch has indicated in court filings that it now intends to appeal to the United States Supreme Court. The *Marks* ruling contradicts two other circuit court rulings and comes at a time when the Federal Communications Commission is engaged in a proceeding to itself interpret the meaning of autodialer. The FCC's current chairman, Ajit Pai has publicly taken the position that autodialer should be interpreted more narrowly than it was by the Ninth Circuit, and even noted in a 2015 dissent that the interpretation of ATDS now espoused by the Ninth Circuit defies grammar. *See* 2015 Order at 8074 ("[I]f [equipment] cannot store or produce telephone numbers to be called using a random or sequential number generator and if it cannot dial such numbers—then how can it possibly meet the statutory definition? It cannot."). The FCC's new interpretation is expected to issue in the New Year.

Authors

Nicola Menaldo

Partner
NMenaldo@perkinscoie.com 206.359.8000

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