

## Ninth Circuit Creates Split Of Authority as to TCPA's Scope

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### Key Points

- Parting company with the 3rd Circuit, the 9th Circuit has ruled that equipment that can automatically dial stored numbers may qualify as an ATDS under the TCPA.
- The ruling creates a split of authority as to whether the TCPA applies only to equipment capable of random or sequential number generation.
- This critical issue—the proper definition of an ATDS—is now before the FCC, wiring of capital or funds by the sanctioned party in response to capital calls or drawdowns
- distributions of any profits or funds to the sanctioned party; and
- redemptions of the LP interests of a sanctioned party.

In advance of an anticipated ruling from the FCC, the 9th Circuit has interpreted that the term “automatic telephone dialing system” (“ATDS”) in the Telephone Consumer Protection Act (TCPA) to extend to equipment capable of dialing stored numbers automatically, regardless of whether those numbers have been randomly or sequentially generated.<sup>1</sup> The court determined that the statutory definition of an ATDS was ambiguous, and construed the statute to eliminate the requirement that equipment must have the capacity to generate random or sequential numbers to qualify as an ATDS. The court rejected the 3rd Circuit’s decision in *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (2018), which found random or sequential number generation was required under the plain language of the statute. The 9th Circuit’s holding also appears to conflict with the D.C. Circuit’s **decision** in *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), which vacated a 2015 FCC ruling that defined an ATDS to encompass most modern dialing technologies, including ubiquitous personal smartphones. Clarity on this threshold question as to the scope of the TCPA’s restrictions must now await further rulemaking from the Federal Communications Commission (FCC).

### Background

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<sup>1</sup> *Marks v. Crunch San Diego, LLC*, --- F.3d ---, 2018 WL 4495553 (9th Cir. Sept. 20, 2018)

In *Marks*, the district court granted summary judgment to a TCPA defendant that used a third party text messaging platform to send promotional messages to numbers on a stored list. 2018 WL 4495553 at \*5-6. After plaintiff received three text messages over the course of eleven months, he filed a putative class action, claiming that the texts violated the TCPA's restrictions on auto-dialed calls placed without prior express consent. In granting summary judgment, the lower court reasoned that "because the [texting] platform lacks a random or sequential number generator, it is not currently an ATDS."<sup>2</sup> The district court added that the platform could not "reasonably be termed a 'random or sequential number generator'" because it required "human curation and intervention" to store numbers. *Id.*

After oral argument, the 9th Circuit ordered supplemental briefing in light of the D.C. Circuit's decision in *ACA Int'l*, which vacated the FCC's broad interpretation of an ATDS. The D.C. Circuit in *ACA Int'l* rejected as unreasonable a notorious 2015 FCC ruling under which "all smartphones qualify as autodialers" and were thus subject to the TCPA's restrictions. 885 F.3d at 700. The parties' supplemental briefing in *Marks* addressed (among other things) whether the FCC's earlier rulings on the ATDS definition remained viable, notwithstanding the vacatur in *ACA Int'l*.

## The Marks Decision

Turning to the plain language of the TCPA, the 9th Circuit concluded that the statutory definition of an ATDS (at 47 U.S.C. § 227(a)(1)) "is ambiguous on its face," so as to require the court to review the definition's "context" and "place in the overall statutory scheme[.]" 2018 WL 449555, at \*8-9. The court examined other "provisions in the TCPA" that allowed an autodialer to call specific numbers, such as when the called party provides prior express consent or when the call is to collect a debt owed to or guaranteed by the United States. *Id.* at \*8 (citing 47 U.S.C. § 227(b)(1)(A)). The court reasoned these provisions "demonstrate[] that equipment that dials from a list of individuals" who consent or owe a debt — "rather than merely dialing a block of random or sequential numbers" — "is still an ATDS but is exempted from the TCPA's strictures." *Id.*

The court also rejected defendant's argument "that a device cannot qualify as an ATDS unless it is fully automatic, meaning that it must operate without any human intervention whatsoever." *Id.* at \*9. The court reasoned that because it is the "dialing" which must be "automatic," "Congress made clear that it was targeting equipment that could engage in automatic dialing, rather than equipment that operated without any human oversight or control." *Id.* It added, "[c]ommon sense indicates that human intervention of some sort is required" to operate an ATDS, such as "turning on the machine" or "flip[ping] the switch." *Id.*

## Going Forward

*Marks* is difficult to square with the D.C. Circuit's rejection in *ACA Int'l* of the FCC's ATDS definition under which "every smartphone qualifies as an ATDS[.]" 885 F.3d at 697. The D.C. Circuit held that the FCC's "eye-popping" interpretation was "utterly unreasonable," insofar as "[n]othing in the TCPA countenances concluding that

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<sup>2</sup> *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1292 (S.D. Cal. 2014)

Congress could have contemplated the applicability of the statute's restrictions to the most commonplace phone device used every day by the majority of Americans." *Id.* at 699. The 9th Circuit's interpretation of the ATDS definition to include every device that can dial numbers automatically from a stored list likewise encompasses any smartphone with such programming.

The contextual analysis in *Marks* also raises more questions than it answers. Random or sequential number generation may yield stored lists of numbers, and statutory "exception[s]" (e.g., consent) may apply to certain of these numbers. 2018 WL 4495553, at \*8. It does not follow that the ATDS definition must necessarily extend to all technology that can dial automatically from stored lists. The absence of any reference to stored lists in the statutory definition would presumably indicate that the TCPA's scope is not so broad. These and other issues raised by the court's opinion suggests that it may be subject to petitions for further appellate review.

In the meantime, however, the 9th Circuit's confirmation that all prior FCC rulings on this issue have been vacated clears the ground for anticipated rulings by the FCC that will likely establish the definition of an ATDS going forward. Indeed, *Marks* engaged in statutory construction only in the absence of any "binding" FCC rulings interpreting the statutory definition. 2018 WL 4495553, at \*6. The 9th Circuit was careful not to reach other key issues left open after *ACA Int'l*, including "whether the device needs to have the *current* capacity to perform the required functions or just the potential capacity to do so," *id.* at \*9 n.9, and whether a call or text must be made with the required functionality in order for the TCPA to apply. See *ACA Int'l*, 885 F.3d at 703-04. Until the FCC provides much-needed clarity on these critical issues, the scope and proper application of the TCPA remain unsettled.