

Appellate Courts Split on the Definition of an Autodialer

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The Telephone Consumer Protection Act (“TCPA”) prohibits telemarketers from using an automatic telephone dialing system (“ATDS” or “autodialer”) when calling consumers’ cell phones without their prior express written consent.¹ With each violation, telemarketers risk regulatory penalties of up to \$16,000, and class action lawsuits can impose statutory damages of \$500 per call.

But what exactly is an autodialer? The TCPA defines it as “equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator; and . . . to dial such numbers.” When the TCPA was enacted in 1991, it was clear which devices met this definition. But, with the proliferation of emerging communication technologies in the last decade, and telephones now capable of holding large contact lists and calling at the push of a button, could nearly every phone be considered an autodialer? This year, several appellate courts have tried to answer this question, but the most recent decision by the Ninth Circuit Court of Appeals in *Marks v. Crunch San Diego, LLC*, has left TCPA litigators and the telemarketing industry more confused than ever before.

The confusion started in the D.C. Circuit Court of Appeals in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). In *ACA International*, business groups asked the FCC for clarification on how it would apply the definition of an autodialer to new technologies. The FCC then held, in its 2015 Declaratory Ruling, that an *autodialer* included both equipment that *currently* functioned as an autodialer *and* equipment that had the *potential future capacity* (through software upgrades or modifications) to function as an autodialer. The business groups, panicked by the ruling, challenged it in the D.C. Circuit as overly broad. They hoped to persuade the court to limit the definition of an autodialer only to equipment that had the *present ability* to act as an autodialer.

The D.C. Circuit agreed with the business groups and implied that any interpretation of the TCPA should aim to avoid “subject[ing] ordinary calls from . . . conventional smartphone[s] to the [TCPA’s] coverage.” *See ACA Int’l*, 885 F.3d at 692. The court reasoned that if the FCC’s definition were to stand, “[E]very uninvited communication from a smartphone [would] infringe[] on federal law, and that nearly every American [would be] a TCPA-violator[,]” because almost all smartphones have the potential future capacity to function as an autodialer through an application update or modification. *Id.* at 698. Accordingly, the D.C. Circuit rejected

¹ The TCPA’s restriction on the use of an autodialer for telemarketing calls only applies when the call is made to induce the purchase of goods or services but does not apply to calls made only for informational or transactional purposes.

the FCC's definition as "an unreasonably, and impermissibly, expansive one." *Id.* at 700. This was a major victory for the industry.

Unfortunately, although the D.C. Circuit struck down the FCC's definition of an autodialer, it failed to provide a new one and left open the additional question of "whether a device must itself have the ability to generate random or sequential telephone numbers to be dialed. Or is it enough if the device can call from a database of telephone numbers generated elsewhere?" *Id.* at 702. Other appellate courts seemed poised to adopt a uniform answer to the D.C. Circuit's question. Instead, on September 20th, in *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 U.S. App. LEXIS 26883 (9th Cir. Sep. 20, 2018), a unanimous three-judge panel on the Ninth Circuit parted ways with its sister courts on the definition of an autodialer, sinking the telemarketing industries' hopes of a uniform position on the definition.

The Ninth Circuit case began when Jordan Marks alleged, in 2014, that a gym operator, Crunch San Diego, LLC ("Crunch"), violated the TCPA by using a web-based marketing platform to send three text messages to his cell phone over a period of 11 months. The trial court, however, disagreed with Marks and found that Crunch did not violate the TCPA because its text messaging system was not an autodialer. The court reasoned that because the messaging system "presently lacked a random or sequential number generator, and did not have the potential capacity to add such a feature[,]" the messaging system failed to qualify as an autodialer. *Id.* at *18. Marks appealed, but the Ninth Circuit stayed the case until after the D.C. Circuit decided *ACA International*.

After the *ACA International* decision but before the Ninth Circuit reopened *Marks*, the Third Circuit Court of Appeals, in *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018), aimed to answer the question left open by the D.C. Circuit: "whether a device must itself have the ability to generate random or sequential telephone numbers to be dialed." *ACA Int'l*, 885 F.3d at 702. The device at issue in *Dominguez* was Yahoo's Email SMS Service, which "sent messages only to numbers that had been individually and manually inputted into its system by a user." *Dominguez*, 894 F.3d. at 121. Reviewing the trial court's conclusion, the appellate court found that the plaintiff could not "point to any evidence that creates a genuine dispute of fact as to whether the Email SMS Service had the present capacity to function as an autodialer *by generating random or sequential telephone numbers* and dialing those numbers." *Id.* (emphasis added). Accordingly, under this Third Circuit ruling, if a device *cannot* generate random or sequential telephone numbers, it does not meet the definition of an autodialer.

Three months later, the Ninth Circuit revisited the *Marks* case. The court began by agreeing with its sister circuits that the FCC's broad 2015 definition of an autodialer was *no longer binding*. However, the Ninth Circuit expressly rejected the Third Circuit's narrow definition of an autodialer and held that "the statutory definition of autodialer is not limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' **but also includes devices with the capacity to dial stored numbers automatically.**" *Marks*, 2018 U.S. App. LEXIS 26883, at *25 (emphasis added). Equally troubling, the Ninth Circuit's interpretation of the TCPA would seem to encompass a smartphone, which is inconsistent with the D.C. Circuit's guidance that any interpretation of the TCPA should aim to avoid bringing conventional smartphones within the definition of an

autodialer. This holding by the Ninth Circuit represents a great expansion of the definition of an autodialer and hands TCPA plaintiffs a major victory that could pave the way for future TCPA class actions.

Since the decision in *Marks*, the FCC has issued a [notice](#) asking for comment on what constitutes an autodialer under the TCPA. The comment and reply comment deadlines are set for October 17, 2018 and October 24, 2018, respectively.

Further, it is possible that the case will be appealed to the U.S. Supreme Court. However, until the Supreme Court reaches a decision, or the FCC issues further guidance on the definition of an autodialer, *Marks* is the law of the land for those states in the Ninth Circuit's jurisdiction: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. Similarly, *Dominguez* is the law of the land in the Third Circuit's jurisdiction: Delaware, New Jersey, and Pennsylvania.

What does this mean for the industry?

Banks and insurance companies that market products and services to new or existing customers will need to evaluate what types of telecommunications equipment they use to call consumers. In the Ninth Circuit, equipment that only stores and dials telephone numbers automatically may now be considered an autodialer (when they had not been in the past), triggering the requirement to obtain consent from the consumer before placing the marketing call.

Companies who are unsure of whether their communications equipment now falls within the definition of an autodialer should seek the advice of counsel regarding how to best comply with the TCPA in light of the recent court decisions.