ALERT - MARKS V. CRUNCH SAN DIEGO LLC – AUTOMATIC TELEPHONE DIALING SYSTEM – TELEPHONE CONSUMER PROTECTION ACT

The United State Court of Appeals for the Ninth Circuit (the "Ninth Circuit") published their opinion of *Marks v. Crunch San Diego LLC* ("*Marks v. Crunch*"), a case interpreting the mandates of the Telephone Consumer Protection Act ("TCPA"), on September 20, 2018. Please find a brief review of the history of *Marks v. Crunch*, as well as an overview of the Ninth Circuit's recent findings below.

HISTORY

In *Marks v. Crunch*, the device at issue is the Textmunication system, which is a web-based marketing platform designed to send promotional text messages to a list of stored telephone numbers. Phone numbers are captured and stored in one of three ways: An operator of the Textmunication system may manually enter a phone number into the system; a current or potential customer may respond to a marketing campaign with a text (which automatically provides the customer's phone number); or a customer may provide a phone number by completing a consent form on a Textmunication client's website. A client of Textmunication can then design a marketing campaign that, for example, offers customers free passes and personal training sessions, provides appointment reminders, sends birthday greetings, etc., and the Textmunication system will automatically send the desired messages to the stored phone numbers at a time scheduled by the client.

Marks, who signed up for a Crunch Fitness ("Crunch") gym membership, received three texts messages from the Textmunication system and sued Crunch Fitness for what he alleged were violations of the TCPA; specifically, using an automatic telephone dialing system ("ATDS"). The United State District Court for the Southern District of California ("District Court") in December 2016, granted summary judgment in favor of Crunch on the grounds that the Textmunication system did not qualify as an ATDS because it presently lacked a random or sequential number generator, and did not have the potential capacity to add such a feature.

This case's timeline closely aligned with significant changes being made by the Federal Communications Commission's (the "FCC"), on their interpretation of an autodialer. In July 2015, the FCC issued a controversial TCPA Declaratory Ruling and Order (the "Order") wherein it created an expansive definition of what constitutes an illegal "autodialer." The Order defined an "autodialer" as any equipment which has "the *capacity*" to store and dial telephone numbers using a random or sequential number generator. Practically, this definition meant that all modern smartphones were in fact "autodialers." The decision was met with great skepticism and legal challenges. After years of anticipation, on March 16, 2018, the D.C. Circuit Court of Appeals issued its opinion in the matter of *ACA International v. Federal Communications Commission*. The D.C. Circuit Court of Appeals struck down the expansive "autodialer" definition and indicated that the FCC would have to redefine what constitutes an autodialer in a much more limited fashion.

NINTH CIRCUIT

On the heels of the *ACA International v. Federal Communications Commission* decision, the Ninth Circuit in *Marks v. Crunch*, found that there

existed a genuine issue of material fact regarding the District Court's ruling and ruled in turn, that the District Court's decision of summary judgment, should be vacated in light of this new information. The Ninth Circuit's finding was based on the fact that the recent interpretations and rulings regarding ATDS by the FCC, which were relevant when the District Court heard the case, were no longer applicable. Thus, *Marks v. Crunch* should be evaluated based on the statutory definition of ATDS as set forth by Congress in 1991 and not by the interpretations/rulings that were made in the years since.

In its review, the Ninth Circuit concluded, that the statutory definition of ATDS 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. The Ninth Circuit read Section 227(a)(1) to provide that the term automatic telephone dialing system meant equipment which has the capacity (1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator and to dial such numbers. Further the Ninth Circuit rejected Crunch's argument that a device cannot qualify as an ATDS unless it is fully automatic.

CONCLUSION

With the release of the Ninth Circuit's opinion, the case may be re-tried based on the Ninth Circuit's findings. Additionally, it is safe to assume that when the FCC reconvenes to define what constitutes an "autodialer," the definition will be much more business friendly.

References:

Marks v. Crunch San Diego, LLC, No. 14-56834, 2018 U.S. (9th Cir. Sep. 20, 2018).

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