TCPA Tracker - October 2018

October 18, 2018

Recent News

FCC Seeks Further Comment on Interpretation of the TCPA In Light of the *Marks v. Crunch San Diego, LLC* Decision

The FCC seeks further comment on the definition of an "automatic telephone dialing system" after the Ninth Circuit, in *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495533 (9th Cir. Sept. 20, 2018), declared the statutory language to be "ambiguous on its face" relating to the question of whether the phrase "using a random or sequential number generator" modifies both "store" and "produce." The court interpreted the statutory language expansively so that an 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 stored numbers and to dial store numbers automatically." This interpretation deviates from the D.C. Circuit's view in the *ACA International* case, where that court determined that the TCPA foreclosed any interpretation that "would appear to subject ordinary calls from any conventional smartphone to the Act's coverage." See *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

In particular, the Consumer and Governmental Affairs Bureau seeks input on the following:

1. If the statutory definition of ATDS is ambiguous, how should the FCC exercise its discretion to interpret the ambiguities?
2. Does the interpretation by the Ninth Circuit in the *Marks* case mean that any device with the capacity to dial stored numbers automatically functions as an ATDS?
3. What devices (such as, possibly, smartphones) have the capacity to store numbers? What devices that can store numbers also have the capacity to automatically dial such numbers?

Comments were due to the FCC on October 17, 2018, and replies are due on October 24, 2018.

FCC Petitions Tracker

Kelley Drye's Communications group prepares a comprehensive summary of pending petitions and FCC actions relating to the scope and interpretation of the TCPA.

Number of Petitions Pending

- 28 (+9 seeking a retroactive waiver of the opt-out requirement for fax ads)
- 1 petition for reconsideration of the rules to implement the government debt collection exemption

- 1 application for review of the decision to deny a request for an exemption of the prior-express-consent requirement of the TCPA for "mortgage servicing calls"
- 3 requests for reconsideration of the 11/2/16 fax waiver in response to petitions by 22 parties
- 1 request for reconsideration of the 10/14/16 waiver of the prior express written consent rule granted to 7 petitioners

New Petitions Filed

- *IHS Markit Ltd. – Petition for Emergency Declaratory Ruling* – the Petition asks the FCC to confirm that motor vehicle safety recall-related communications – including, for example, those calls made to address certain recalls of vehicles equipped with Takata airbag inflators – are made for emergency purposes and therefore fall under the TCPA's public safety exception. (Received 9/21/2018; comments on issues raised by the Petition are due by 11/5/18).

Upcoming Comments

- *Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's Marks v. Crunch San Diego, LLC Decision* – The Consumer and Governmental Affairs Bureau issued a Public Notice seeking further comment on what constitutes an "automatic telephone dialing system" and the significance of the *Marks v. Crunch San Diego, LLC* decision in light of the remand of the D.C. Circuit's decision in *ACA International v. FCC*. (Comments Due 10/17/2018; Replies Due 10/24/18).
- *Comment on Petition for Emergency Declaratory Ruling Filed By IHS Markit Ltd.* – comments on a petition for declaratory ruling seeking confirmation that "non-telemarketing calls related to motor vehicle safety recalls are 'made for emergency purposes [ ]' . . . and [are] thus exempt from the [Telephone Consumer Protection Act's] consent requirements for autodialed or prerecorded calls to wireless numbers." (Comments Due 11/5/2018; Replies Due 11/20/2018).

Decisions Released

- None

Click here to see the full FCC Petitions Tracker.

Cases of Note

Ninth Circuit Issues Ruling on the Definition of ATDS

In *Marks v. Crunch San Diego, LLC*, a unanimous decision by a three-member panel of the Ninth Circuit ruled that an ATDS includes devices with the capacity to automatically dial stored telephone numbers. In *Marks*, plaintiff filed a putative class action against a gym, which used a web-based system to send promotional text messages to a list of stored telephone numbers at a time selected by the gym. No. 14-56834, slip op. at 15 (9th Cir. Sept. 20, 2018).

In the court below, the district court granted summary judgment to the gym, ruling that the system

was not an ATDS because "it lacked the present or potential capacity 'to store or produce telephone numbers to be called, using a random or sequential number generator.'" *Id.* at 4. The Ninth Circuit reversed, holding that an "ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator." *Id.* In its analysis, the court explicitly rejected the Third Circuit's conclusion, which was consistent with the district court's ruling. *Id.* at 23 n.8.

The Ninth Circuit reached its conclusion by analyzing the TCPA's structure and context, which it found "indicate that Congress intended to regulate devices that make automatic calls." *Id.* at 20-21. To further support its conclusion that an ATDS can include automatic dialing of stored numbers, the court noted that some TCPA provisions allow an ATDS to call selected numbers, such as to recipients who have given their prior express consent or for calls "solely to collect a debt owed to or guaranteed by the United States." *Id.* at 21-22. The Ninth Circuit concluded that these exemptions supported an interpretation that calls placed to recipients on a stored list fell within the definition of an ATDS.

Finally, the court rejected the gym's argument that a device is not automatic unless it operates without any human intervention. *Id.* at 23. It ruled that the Congress intended to regulate "equipment that could engage in automatic dialing, rather than equipment that operated without any human oversight or control." *Id.* at 23-24.

District Court in Florida Holds Allegations of Standing Are Not Necessary for Removal

On September 10, 2018, the Southern District of Florida held that a defendant need not allege that a plaintiff has Article III standing in its notice of removal. In *Gonzalez v. TCR Sports Broadcasting Holding, LLP*, the court denied a plaintiff's motion to remand, ruling that the defendants need only state a plausible allegation of federal jurisdiction in a notice of removal. No. 18-cv-20048, 2018 WL 4292018 at *2 (Sept. 10, 2018).

The plaintiff had filed a TCPA class action in Florida state court, alleging that the defendants unlawfully sent text message advertisements without his prior express consent. *Id.* at *1. In support of remand to state court, the plaintiff argued that the "short and plain statement of the grounds for removal" under 28 U.S.C. § 1446(a) required the defendants to allege that the plaintiff had Article III standing. *Id.* at *2. The court rejected the plaintiff's argument, holding that "a defendant must make a plausible jurisdictional allegation—that is, a plausible allegation of either federal question jurisdiction or diversity jurisdiction—in its notice of removal." *Id.* In *Gonzalez*, the court concluded that the defendants met this standard because the plaintiff's claims "are entirely based on federal statute." *Id.*

The court declined to determine whether the plaintiff had Article III standing because the issue had not been fully briefed and argued. *Id.* However, it noted that remand may be the proper remedy if it later determines that the plaintiff does not have standing to bring TCPA claims. *Id.*