Another Defendant Falls Victim to Marks' Broad Definition of an ATDS

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The Marks decision gets stronger by the day. In a recent case out of the District Court for the Eastern District of California, a judge applied the Marks definition of an ATDS and granted the plaintiff’s motion for summary judgment.

In Lamkin v. Portfolio Recovery Assocs., 2019 U.S. Dist. LEXIS 165820 (E.D. Cal. Sep. 25, 2019), plaintiff Pam Lamkin (“Plaintiff”) sued defendant Portfolio Recovery Associates, LLC (“PRA”) for violation of the TCPA alleging that PRA’s dialer is an ATDS and that PRA called her without her prior express consent. The facts of this case are pretty straightforward. Plaintiff opened a credit card with Wells Fargo and after she fell behind on payments, Wells Fargo charged off her account and later sold the debt to PRA. After acquiring Plaintiff’s debt, PRA successfully used the “skip tracing” process to obtain Plaintiff’s contact information, which it then used to call Plaintiff regarding her debt 199 times. PRA’s calls were made using its Avaya Proactive Contact Technology (“Avaya”) dialer.

In the ensuing TCPA lawsuit, PRA did not dispute that it called Plaintiff’s cell phone,
nor did PRA offer any evidence that it had obtained Plaintiff’s prior express consent to be called. Instead, **PRA decided to argue that its Avaya dialing system does not fall within the definition of an ATDS.** In support of its argument, PRA relied on the Ninth Circuit’s 2009 decision in *Satterfield v. Simon & Schuster, Inc.*, arguing that, under *Satterfield*, a device must have the capacity to generate random or sequential numbers to constitute an ATDS. PRA maintained that its Avaya system did not have such capacity. Regardless, the District Court rejected this argument.

First, the District Court stated that the Ninth Circuit’s decision in *Satterfield* does not conflict with its later decision in *Marks*. It reasoned that the *Satterfield* decision discussed only the meaning of the term “capacity,” and that the scope of that capacity was not at issue.

Second, the District Court noted that the *Satterfield* decision was delivered in 2009, which meant that the definition of an ATDS as provided in the FCC’s 2003 Order was still valid and not yet vacated by the D.C. Circuit in *ACA International*. Thus, the court in *Satterfield* was not in a position to interpret the statutory definition of an ATDS.

Third, the court pointed out in a footnote that the Ninth Circuit unanimously denied the *Marks* appellee’s petition for rehearing en banc and in the appellee’s petition, the first argument was that *Marks* conflicts with *Satterfield*.

Thus, the District Court applied the definition of an ATDS as established in *Marks* and concluded that PRA’s Avaya dialer constituted an ATDS because it calls telephone numbers from a stored list.

Finally, the District Court also held that PRA made the calls to Plaintiff willfully and knowingly because PRA did not dispute that it made the calls, nor did it dispute that it lacked prior express consent, and it intended to make the calls using an ATDS. As a result, the District Court assessed treble damages against PRA, which resulted in a damages award for Plaintiff of $298,500.

The takeaway here is that TCPA defendants within the Ninth Circuit who have the issue of ATDS use involved in their case must seriously assess their consumer contact strategy. *Marks* has all but cemented itself in the Ninth Circuit for the time being and until the FCC addresses the issue or the circuit split on the ATDS definition is otherwise resolved, companies using any form of automated dialing equipment would be wise to proceed with caution and the knowledge that some court somewhere may find that equipment to fit within the ATDS definition.

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