Not Even in the Ninth Circuit: LiveVox HCI Platform Continues to Pile Up Wins as a Manual Solution in an Uncertain TCPA World

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It is tough sledding for TCPA Defendants these days in the Ninth Circuit.

Even as other Circuit Courts of Appeal begin limiting the scope of the TCPA by ruling that the statute’s ATDS definition does not apply to dialers that call from a list, the rule remains the opposite in the Ninth Circuit—any dialer that calls “automatically” from stored numbers remains subject to the TCPA under Marks.

Even Marks has its limits, however, as demonstrated in a big win for the LiveVox HCI platform yesterday. In Meier v. Allied Interstate, Case No.: 18-CV-1562-GPC-BGS, 2020 U.S. Dist. LEXIS 28249 (S.D. Cal. Feb. 19, 2020) the Court addressed—at the summary judgment stage—whether the use of HCI constitutes the use of an ATDS under Marks. Importantly, the Plaintiff raise the more sophisticated version of this argument in that it challenged that HCI integrates with the broader LiveVox platform—which includes predictive dialing capabilities—such that considered together the “system” has the capacity to serve as an ATDS. (You’ve seen this argument go well for plaintiffs in the past.)

But no dice this time.
As to the use of the HCI system itself, the Court finds that “under the plain language” of the TCPA numbers must be dialed “automatically” to trigger statutory coverage. HCI does not permit users to call automatically—rather a call can only be launched when a human user initiates the dial. Yet, in the Meir court’s view, “the essential function of an ATDS is the capacity to dial numbers without human intervention.” From there the analysis is simple: “Here, the Court finds that the LiveVox HCI system is incapable of “non-manual” dialing because it requires the intervention of clicker agents, and thus is not an ATDS.” So there you go.

Now the larger question—is the integration between HCI and the larger Livevox platform sufficient to convert HCI calls into dialer calls? Answer: no.

And the reasoning here is absolutely critical to understand. As I have said repeatedly on my road show—the key to building a suitable manual process is focusing on the equipment actually used to place the call. The court agrees: “the Court concludes that the “equipment” at issue is the HCI dialer, and not the LiveVox Platform as a whole.”

The Court spends a good amount of time analyzing how the HCI platform operates in view of FCC guidance that separating list compilation from dialing functionality does not, itself, resolve whether the “system” as a whole has the capacity for automatic dialing. Yet, although HCI does contain certain segregated components, those components fit together in a manner specific to the manual dial process and do not integrate for purposes of automatic dialing—at least not as used to call the Plaintiff. This is especially true as the two dialers (i.e. HCI and the Live Vox predictive dialer) are “separated at the hardware and software level.” (Another key ingredient for safe manual dialing.)

Meier is a fascinating case that correctly identifies the TCPA’s required focus is on the equipment actually used to place the calls, and not necessarily the broader web of integration surrounding that equipment. On a clear judicial day, the integrated systems may span as far as the IoT can take you. But any thoughtful application of the TCPA’s ATDS definition must look at how calls are being placed as a practical matter.

Notably this is HCI’s second win in the Ninth Circuit following Marks—is that a trend?—and its third post-Marks win overall.

Also Defense counsel in this suit is my old buddy Paul Grammatico. Here’s his quick take on the ruling: “We’re pleased the Court correctly concluded, as every other court has, that even under a Marks analysis HCI is not at ATDS.” Keep up the good work buddy.

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