

Crunch Gym Member Takes TCPA Fight To 9th Circ.

By [Daniel Siegal](#)

Law360, Los Angeles (December 6, 2016, 5:35 PM EST) -- A member of gym chain Crunch San Diego LLC on Tuesday urged the Ninth Circuit to revive his putative class action accusing Crunch of spamming its members' cellphones with promotional text messages, arguing the company contacted its members with an illegal autodialing system.

During oral arguments in Pasadena, California, Abbas Kazerounian of Kazeriouni Law Group APC, representing named plaintiff Jordan Marks, urged a three-judge panel to reverse U.S. District Judge Cynthia Bashant and find that the platform used by Crunch to send the messages to its members is an "automated telephone dialing system," and is thus banned by the Telephone Consumer Protection Act.

Kazerounian argued that Judge Bashant should have been bound by law to follow the guidance of the [Federal Communications Commission](#) – which in 2003 and 2008 released final rulings interpreting the TCPA to encompass a broad definition of "automated telephone dialing system" that includes not just systems that actually generate phone numbers to dial automatically, but also systems that have the potential to do so.

Crunch's system may have had its members' numbers input by a human, but it sent the marketing texts automatically, and is an autodialer under the broader definition, Kazerounian said.

Circuit Judge Sandra Segal Ikuta, however, asked if this broad definition wouldn't encompass her iPhone, since she could download a program that allowed the phone to automatically call every person in her contact list.

Kazerounian replied in the affirmative, and said that this was "exactly" what the FCC had held in its final rules.

Filed in February 2014, Marks' proposed class action accused Crunch of violating the TCPA by sending him three unsolicited promotional text messages advertising specials on membership prices or personal training rates from November 2012 until October 2013. He sought to represent a nationwide class of consumers who had received the unwanted messages from Crunch.

In October 2014, Judge Bashant [dismissed the suit](#) with prejudice, ruling that the platform used by Crunch to

send the messages to its members couldn't be considered an autodialer because it couldn't generate telephone numbers on its own. She noted that previous courts have expressed concern that relying on the system's potential to store numbers to bring liability under the TCPA could encompass devices like smartphones, which would lead to "absurd" results.

Falling in line with [other court findings](#) around the time of her ruling, Judge Bashant rejected the broader interpretation of "automated telephone dialing system" adopted by the FCC, saying the agency doesn't have the statutory authority to change the TCPA's definition. The FCC has interpreted the term to include equipment that contains the capacity to generate numbers, according to Judge Bashant's order.

On Tuesday, Ian Ballon of [Greenberg Traurig LLP](#), representing Crunch, urged the appellate court to affirm that ruling, arguing that Judge Bashant actually had complied with the FCC's rules, as in 2015 the agency released another order dealing with so-called predictive dialers, which made "very clear" that it was not intending to change the actual definition of an autodialer under the TCPA – a definition that clearly excludes Crunch's system.

"They spend a lot of time talking about the characteristics of a predictive dialer, a predictive dialer dials from a list, but that doesn't mean dialing from a list changes the statutory definition," he said.

The panel took the matter under submission.

Circuit Judges Carlos Bea, Consuelo Maria Callahan, and Sandra Segal Ikuta sat on the panel that heard Tuesday's arguments.

Marks is represented by Jason A. Ibey and Abbas Kazerounian of [Kazerouni Law Group APC](#) and Joshua B. Swigart of [Hyde & Swigart](#).

Crunch San Diego LLC is represented by Ian Ballon, Lori Chang, Nina Boyajian and Justin Barton of Greenberg Traurig LLP.

The case is Jordan Marks v. Crunch San Diego, LLC, case number [14-56834](#) in the U.S. Court of Appeals for the Ninth Circuit.

— Additional reporting by Caroline Simson. Editing by Ben Guilfooy.