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Consumer Lending Update

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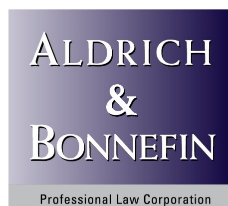
CALIFORNIA APPELLATE COURT AFFIRMS REINSTATEMENT RIGHT ON DEFAULTED DEED OF TRUST

A California appeals court recently affirmed that defaulted mortgage borrowers have the right to reinstate their loan by paying all past due amounts up until five days before a scheduled foreclosure. This result came as no surprise to most practitioners in the field, but apparently surprised the mortgage servicer which had insisted that the borrower could only reinstate the loan by paying it off in full. *Turner v. Seterus, Inc.*, 27 Cal. App. 5th 516 (Ct. App. 2018).

The borrowers in *Turner* were facing foreclosure on their home. About 10 days before the foreclosure one of the borrowers called Seterus, the mortgage servicer, and offered to pay all of the past due amounts to cure the default. The servicer refused the request, stating that the borrowers could cure the default only if they were in the mortgage modification process. However, since the servicer had reviewed the borrowers for a modification in the past five years, they could not receive a modification now. The foreclosure went forward and the property was sold.

The borrowers sued for wrongful foreclosure, among other things. Their principal allegation was that they had tendered the past due amounts as Civil Code Section 2924c permits in order to reinstate the loan, but the servicer had wrongfully refused the offer. Section 2924c(a)(1) provides that whenever a mortgage on real property has been accelerated due to a default in payments, the borrower may cure the default by paying to the beneficiary the entire amount due at the time payment is tendered with respect to principal, interest, and other amounts due other than the portion of principal "as would not then be due had no default occurred." This is referred to as "reinstatement" of the mortgage. The right to reinstate exists until five days before the scheduled foreclosure sale.

Despite the clarity of Section 2924c, the mortgage servicer refused to allow the borrower to reinstate the loan, apparently confusing the right of reinstatement with the more discretionary opportunity to modify the loan. The servicer managed to win this case at trial and on appeal argued that the borrower needed to pay the loan in full in order to redeem the mortgage. The appeals court pointed out that there is a difference between redemption and reinstatement. Redemption requires payment in full, while reinstatement only requires payment of the defaulted amounts.



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The holding of *Turner* is not surprising. What may be more surprising was the servicer's ignorance of a highly relevant aspect of California law on mortgages. The lesson for financial institutions may be to make sure that their mortgage servicers understand more than just the mortgage servicing regulations under RESPA and TILA, but also understand the basic law of the land

Ninth Circuit Broadly Defines Autodialer Phone Systems Under TCPA

The Ninth Circuit has jumped in and tried to define an "automatic telephone dialing system" (ATDS) under the Telephone Consumer Protection Act (TCPA). The court held that almost any modern telephone or texting system that can store numbers meets the definition. Thus some or all of the TCPA compliance burden will fall on persons using modern phone systems to place voice calls or send text messages to consumers for almost any purpose, both marketing and non-marketing. *Marks v. Crunch San Diego, LLC*, 2018 U.S. App. LEXIS 26883 (9th Cir. Sept. 20, 2018).

In 2015 the FCC ruled that predictive dialers and other new technology qualified as an ATDS even if they used stored numbers and did not generate random or sequential numbers, as the statutory definition required. The District of Columbia Court of Appeals overturned this ruling in the *ACA International* case earlier in 2018, leaving the ATDS definition up in the air.

The device at issue in *Marks* was called the Textmunication system, a web-based marketing platform designed to send promotional text messages to a list of stored telephone numbers. After receiving three apparently unwelcome text messages from his gym, the plaintiff filed a class action. The main issue was whether a predictive dialer meets the definition of an ATDS, triggering TCPA coverage.

The statutory definition of an ATDS is a device that dials telephone numbers "generated by a random or sequential number generator." The issue is whether modern systems, which typically dial numbers off an uploaded list, meet the definition. The court decided that, statutory language notwithstanding, an ATDS is not limited to devices with the capacity to call numbers random or sequential number generators produce, and includes devices with the capacity to dial stored numbers automatically. The degree of human intervention in placing the call was also held to be immaterial. A human may push the call button but it's still "automatic" dialing.

The effect of *Marks* goes well beyond predictive dialers. In the Ninth Circuit, predictive dialers are now clearly covered but so is any telephone device with the capability of dialing stored numbers. This covers any modern telephone or cellular phone. Even if the autodial function is turned off, the phone is an ATDS because it has the "capability" of being autodialed. Shortly after the Ninth Circuit issued *Marks*, the FCC reopened comments on its interpretive ruling on the ATDS definition. More to come.

The TCPA is a difficult statute. Institutions are reminded not to directly or indirectly engage in telemarketing activity (voice or text) using any sort of telephone device that has the capability to store phone numbers. Even non-marketing transactional calls to a mobile device or by text have express prior consent requirements which the recipient may revoke at any time, by any reasonable means. Penalties for noncompliance in this area begin at between $500-$1,500 per call. (So don't do it!)

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