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New TCPA Rulings Suggest Shorter Life For Autodialer Suits

By **Becca Wahlquist and Lauri Mazzuchetti** (October 19, 2021, 5:23 PM EDT)

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The Telephone Consumer Protection Act bar has been watching closely the federal court decisions coming down over the past six months in the wake of the U.S. Supreme Court's Facebook v. Duguid decision.[1]

The Facebook opinion was clear and unanimous, but now comes the real test of the strength of the Facebook opinion: Can it keep meritless claims based on automatic telephone dialing systems from embroiling a defendant in expensive and burdensome discovery, potential expert battles and extensive summary judgment briefing on ATDS?

Courts have thus far been divided on how early to consider the ATDS question in a litigation, but a growing number of strong and well-reasoned decisions provides hope that many ATDS-based lawsuits can be stopped at the pleadings stage of litigation.

Background — The Facebook Decision

In Facebook, the Supreme Court had been called upon to resolve a deepening circuit split. Starting about a decade ago the plaintiffs bar had been able to expand the reach of the ATDS to the point where in several federal circuits — including the Ninth and Second Circuits — any system that could merely store telephone numbers was to be considered an ATDS. [2]

As to what dialers could support claims of illegal use of an ATDS, the Supreme Court was clear about the statutory definition of ATDS located in Title 47 of the U.S. Code, Section 227(a)(1):

> Congress' definition of an autodialer requires that in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator.[3]

The Supreme Court thus came down on the side of the U.S. Courts of Appeal for the Seventh and Eleventh Circuits, which each held that for a system to be an ATDS, it must randomly or sequentially create telephone numbers — not merely dial numbers from a stored database.[4]

In the context of reviewing a motion to dismiss, the court found that Facebook's targeted text alert messages to a customer-provided number were not made using a random or sequential number

generator, and that no viable claim of illegal use of an ATDS could be made.

It was very significant that the ruling was definitive and made in the context of a motion to dismiss: The Supreme Court signaled that the lack of a viable ATDS claim could be determined from the pleadings alone, without requiring any further discovery, where it was clear that Facebook was placing targeted calls to the plaintiff's telephone number.

Developments Since Facebook in Responsive Pleadings

For a few heady weeks after that April 1 decision, there was real hope that the Supreme Court's clear rejection of expansive ATDS definitions would finally put an end to "gotcha" TCPA litigation brought against thousands of businesses that were contacting only targeted and customer-provided numbers.

Not all that surprisingly, when the significant and often staggering amounts of available statutory damages are considered, many plaintiffs and attorneys asserting ATDS-based claims have refused to walk away from $500-$1,500 per call statutory damages, even when the calls or texts at issue were directed to a phone number that was not randomly or sequentially generated.

Now, focus has turned to motions dealing with pleadings: motions to dismiss, motions for judgment on the pleadings, and motions to deny leave to amend complaints. The only real relief that can come to American businesses besieged with TCPA claims for calls placed to their own customers is if courts can act definitively and dismiss ATDS claims that are no longer viable in light of Facebook, when targeted calls are at issue.

To date, over 20 federal courts have weighed in on the impact of Facebook on ATDS claims at the pleading stage. A growing number of these courts have been bold in their application of Facebook's clear directive, recognizing that no viable ATDS-based claim can exist when targeted calls to stored customer telephone numbers are put at issue.[5]

However, other courts have been concerned that the ATDS question is better suited for summary judgment, have denied motions to dismiss, and have allowed litigation to proceed into discovery.[6]

Some of the courts reluctant to act definitively on ATDS-based claims at the outset have been told that there is wiggle room in one of the footnotes in the Facebook opinion that undercuts the overall firmness of the court's grammatical and legislative interpretation of ATDS.

This Footnote 7 argument must be addressed and debunked proactively in any motion to dismiss, and several more recent decisions have provided a handy blueprint to the explanation of why Footnote 7 does not, in fact, provide any room for the plaintiffs bar to reexpand the meaning of ATDS.

Addressing the Footnote 7 Argument

The Footnote 7 argument made by plaintiffs is this: In explaining why Congress would have included both "store" and "produce" in the autodialer definition, the Supreme Court noted that "[f]or instance, an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list. It would then store the numbers to be dialed at a later time."[7]

The example in Footnote 7 is followed by a citation to an amicus brief filed by an organization named Professional Association for Consumer Engagement.

Without mentioning that citation, or the contents of the PACE briefing, plaintiffs argue that based on Footnote 7's example of a list from which numbers are picked to call, any system that can take a stored list of numbers and then determine an order for a calling campaign, or assign data for sequencing purposes to telephone numbers in the customer database, is an ATDS.

But this Footnote 7 argument completely decontexualizes the Supreme Court's example that was pulled from an amicus brief filed by PACE.

As the U.S. District Court for the Northern District of California explained in Tehrani v. Joie de Vivre Hospitality, the PACE amicus brief had provided an example of a dialer from the late 1980s that would first generate a sequence of telephone numbers within a defined number range, and then store those numbers, before later randomly selecting those generated numbers.[8]

This is nothing like a company's stored list of customer numbers that were not randomly or sequentially generated telephone numbers in the first place.

Moreover, the Tehrani court recognized that the ultimate determination in Facebook rejected the opinions from the U.S. Courts of Appeal for the Second and Ninth Circuits that had found any system that stored telephone numbers was an ATDS.

It thus cannot be the case that a stored, preexisting customer database of telephone numbers means that an ATDS is in play when targeted numbers from that database are called or texted — because then the Supreme Court would not have reversed the Ninth Circuit's position on ATDS.[9]

Thus even when index numbers were alleged to be used to help sequence calls to the customer-provided numbers in a database, the Tehrani court found that the call at issue that came from a preexisting list of customer's numbers was not placed with a restricted ATDS. Other courts with strong analyses of the weakness of the Foonote 7 opinion should be reviewed as well before any motion to dismiss is drafted.[10]

The Hope for More Definitive Pleadings-Based Decisions

The TCPA plaintiffs who are attempting to keep their ATDS claims afloat are determined to cause confusion to get past motions to dismiss. But where it can be clear that calls or texts are targeted, and/or placed to a customer-provided number, the case law is building that should provide ample support for federal courts to act definitively at the pleadings stage on ATDS claims.[11]

In fact, recently, one of the federal district courts that in early July had deferred addressing the ATDS question until summary judgment has now dismissed ATDS claims with prejudice in light of Facebook.

In Gross v. GG Homes Inc., the U.S. District Court for the Southern District of California held on a motion for reconsideration that even construing the complaint's allegations liberally as is required with a pro se plaintiff, where the texts at issue were clearly targeted to the plaintiff's phone number, ATDS allegations were not plausible.[12]

Citing to the growing body of decisions that have dismissed ATDS lawsuits on the pleadings when targeted communications were at issue, the Gross court reversed itself and dismissed the plaintiff's TCPA cause of action with prejudice.[13]

The Supreme Court was clear as to the scope of ATDS claims, and did not permit the plaintiffs in Duguid to move into discovery into Facebook's dialing systems. Hopefully, as the body of case law discussed in this article continues to develop, more courts will be willing to dismiss complaints alleging ATDS-based claims at the outset where calls or texts were not sent to randomly or sequentially generated numbers.[14]

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[1] Facebook v. Duguid, 141 S.C. 1163 (2021).

[2] See Marks v. Crunch San Diego, LLC, 904 F.3d 1041 (9th Cir. 2018) (equipment with the capacity to store numbers to be called would be an ATDS); Duran v. La Boom Disco, Inc., 955 F.3d 279, 284 (2d Cir. 2020)(agreeing with the Ninth Circuit that "the mere fact that the programs 'store' the lists of numbers is enough to render them ATDSs.").

[3] Facebook, 141 S.C. at 1170 (emphasis added).

[4] See Glasser v. Hilton Grand Vacations Co., 948 F. 3d 1301, 1307-09 (11th Cir. 2020); Gadelhak v. AT&T Servs., 950 F.3d 458, 460 (7th Cir. 2020).

[5] Watts v. Emergency Twenty Four, Inc., No. 20-CV-1820, 2021 WL 2529613 (N.D. Ill. June 21, 2021) (person receiving notifications sent to his stored number, provided while he was an employee at his previous place of work, failed to plausibly allege use of an ATDS in targeted calls).

Hufnus v. DoNotPay, Inc., No. 20-CV-08701-VC, 2021 WL 2585488, at *1 (N.D. Cal. June 24, 2021) (even though platform could pull stored numbers sequentially/randomly, where "the platform only contacts phone numbers specifically provided by consumers during DoNotPay's registration process, and not phone numbers identified in a random or sequential fashion", no viable ATDS claim).

Barry v. Ally Fin., Inc., No. 20-12378, 2021 WL 2936636, at *4 (E.D. Mich. July 13, 2021) ("these calls were targeted at specific individuals in connection with specific accounts held by Defendant. That ends this case.").

Franco v. Alorica, Inc., et al., No. 22-CV05-35-ESX, 2021 WL 3812872, at *3 (C.D. Cal. July 27, 2021) (a defendant who randomly makes calls from a curated list, like the defendant here that called to collect on an allegedly preexisting debt, is "not randomly or sequentially generating phone numbers.").

Borden v. eFinancial, LLC, No. C19-1430JLR, 2021 WL 3602479, at *6 (W.D. Wash. Aug. 13, 2021) ("because Mr. Borden expressly alleges that he provided his phone number to eFinancial—and thus the text messages at issue necessarily were not sent through an ATDS—the court concludes that amendment would be futile and dismisses this action with prejudice").

[6] See, e.g., Gross v. GG Homes, Inc., 2021 WL 2863623, at *7 (S.D. Cal. July 8, 2021) (concluding,

consistent that the "newly clarified definition of an ATDS is more relevant to a summary judgment motion than at the pleading stage," but also noting that there was no allegation or evidence that plaintiff had provided her number to defendant); Miles v. Medicredit, Inc., 2021 WL 2949565, at *4 (E.D. Mo. July 14, 2021) (ATDS determination more suited for summary judgment); see also); Libby v. National Republican Senatorial Committee, No. 21-CV-197-DAE, 2021 WL 4025798 (W.D. Tex. Jul. 27, 2021)(same); Garner and Schick v. Allstate Ins. Co., No. 20 C 4693, 2021 WL 3857786, at *4–5 (N.D. Ill. Aug. 30, 2021)(same); Poonja v. Kelly Serv., Inc., No. 20-CV-4388, 2021 WL 4459526, at *3 (N.D. Ill. Sept. 29, 2021)(same).

[7] Facebook, 141 S.Ct. at 1172 n.7.

[8] Tehrani v. Joie de Vivre Hosp., LLC, No. 19-CV-08168-EMC, 2021 WL 3886043, at *5–6 (N.D. Cal. Aug. 31, 2021) (explaining the difference between the generated and then stored list of numbers discussed in Footnote 7, a company's stored list of its customers' telephone numbers).

[9] Id., at *4.

[10] See, e.g., Barry, 2021 WL 2936636, at *6; Hufnus, 2021 WL 2585488, at *1; Timms v. USAA Fed. Sav. Bank, No. 3:18-CV-01495-SAL, 2021 WL 2354931, at *6 (D.S.C. June 9, 2021) (rejecting Footnote 7 arguments and granting summary judgment to Defendant on ATDS claims, where calls were targeted to Plaintiff and his phone number was not randomly or sequentially generated).

[11] See, e.g., Brickman v. Facebook, Inc., No. 16-CV-00751-WHO, 2021 WL 4198512, at *2 (N.D. Cal. Sept. 15, 2021) (following Tehrani, Hufnus, and other recent decisions in granting a motion to dismiss with prejudice given the targeted nature of the calls, and noting at *3 that in many cases where plaintiffs have been permitted to proceed into discovery, it was not clear that there was any relationship between the plaintiff and the caller).

[12] See Gross v. GG Homes, Inc., No. 3:21-cv-00271-DMS-BGS, 2021 WL 4804464, at *3 (S.D. Cal. Oct. 14, 2021) ("The targeted nature of the underlying texts contradicts the notion that Plaintiff's telephone number could have been produced through a random or sequential number generator.").

[13] Id. (collecting cases).

[14] No circuit court has yet to weigh in on the impact of Facebook at the pleadings stage of litigations but decisions from the circuit courts can be expected soon.