Articles + Publications | August 23, 2021

4 Ways Courts Are Approaching High Court's TCPA Ruling

WRITTEN BY

Virginia Bell Flynn | Brooke K. Conkle | Sarah Siu | Chad R. Fuller

As published in Law360 on August 23, 2021. *Reprinted here with permission.*

The U.S. Supreme Court's long-awaited decision in *Facebook v. Duguid*[1] answered in the affirmative a question that had divided courts for years: Did the Telephone Consumer Protection Act's definition of automatic telephone dialing system require random or sequential number generation?

It also created a new question: How would lower courts implement the court's holding? With the *Facebook* opinion now four months old, courts are beginning to issue decisions analyzing the court's framework.

Background

In a surprisingly unanimous decision issued on April 1, the Supreme Court held that an ATDS requires a system to have capacity to store or produce a telephone number using a random or sequential number generator. The bottom line of the court's decision was plain: no random or sequential number generator, no ATDS.

For those litigating the TCPA, the question then became how district courts would treat the *Facebook* opinion. How much litigation would courts require for a defendant to show that its telephone equipment does not randomly or sequentially generate telephone numbers? Courts have taken four distinct paths in the four months following the *Facebook* decision.

Path 1: Defer Until Summary Judgment

Several of the earliest decisions from lower courts post-*Facebook* dealt with motions to dismiss that had been stayed pending the Supreme Court's decision.

The first decision, *Montanez v. Future Vision Bank*,[2] from the U.S. District Court for the District of Colorado, denied the defendant's motion to dismiss, stating that whether the bank's calling system used a random or sequential number generator was a question of fact to be resolved at the summary judgment stage.

The U.S. District Court for the Western District of Texas followed in the *Montanez* court's footsteps in *Atkinson v. Pro Custom Solar LCC*.[3]

The U.S. District Court for the Eastern District of Missouri also cited *Montanez* in denying a motion for partial

judgment on the pleadings in *Miles v. Medicredit Inc.*[4] It explained that the court could not determine from the pleadings whether the dialer in question stored or produced telephone numbers using a random or sequential number generator, but the factual details that would help answer that question "are not required at the pleading stage."[5]

Path 2: Cabin Footnote 7 — Actual Use, Not Capacity

In the months following the *Facebook* opinion, many TCPA plaintiffs counsel have pointed to footnote 7 of the opinion in an attempt to save TCPA claims against defendants who employ predictive dialers. Footnote 7 reads:

> Duguid argues that such a device would necessarily "produce" numbers using the same generator technology, meaning "store or" in § 227(a)(1)(A) is superfluous. "It is no superfluity," however, for Congress to include both functions in the autodialer definition so as to clarify the domain of prohibited devices. For 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 those numbers to be dialed at a later time. In any event, even if the storing and producing functions often merge, Congress may have "employed a belt and suspenders approach" in writing the statute.[6]

Some advocates have contended that this footnote supports the proposition that a telephone system that randomly dials numbers from a preproduced list still constitutes an ATDS under *Facebook*.

Courts have not looked favorably on this argument, however. In *Timms v. USAA Federal Savings Bank*,[7] the U.S. District Court for the District of South Carolina granted USAA's motion for summary judgment, ruling that automatic dialing from a preset list was distinct from storing or producing numbers using a random or sequential number generator.

It further held that *Timms* had taken the footnote out of context. Footnote 7, the court explained, was written specifically to rebut the argument that including both "store" and "produce" was superfluous under the court's interpretation.

The district court noted that the footnote referred to an amicus brief that had explained how, in the technology prevalent when the TCPA was enacted, a patent was available where telephone equipment could create an array of telephone numbers, store them in a list and, in a separate step, generate a random number used to identify the number to be stored or called.

A preproduced list, however, is not a list that is sequentially generated and stored, meaning that the predictive dialer used by the defendant was not an ATDS and footnote 7 was no help to the plaintiff.

The U.S. District Court for the Northern District of California took a similar approach in *Hufnus v. DoNotPay Inc.*[8] There, the court held that the defendant's system was not an autodialer because it could only contact phone numbers if they were expressly provided by consumers, not numbers identified or obtained in a random or sequential fashion.

The court stated that footnote 7 was inapplicable, because it referred to a preproduced list that was itself created through a random or sequential number generator, not by consumers providing their numbers while signing up for

services. The court added that DoNotPay's platform is similar to the systems that had been determined not to be autodialers by the courts of appeal with which the Supreme Court had sided.

Likewise, at the summary judgment stage in *Barnett v. Bank of America*, the U.S. District Court for the Western District of North Carolina granted a defendant's motion for summary judgment because the defendant offered affirmative evidence that its Avaya system did not use a random or sequential number generator, but selected calls "from a pre-existing list created based on criteria from the dialer administrators."[9] Since there was no evidence of use of a random or sequential number generator, the system did not qualify as an ATDS.

Path 3: Hold Intentional Contact Is Not an Autodialer

In mid-July, the U.S. District Court for the Eastern District of Michigan expressly sided with the *Timms* court at the motion to dismiss stage in *Barry v. Ally Financial Inc.*, reasoning that footnote 7 was dicta and that factual development was unnecessary because there were no allegations that a random or sequential number generator had been actually used.[10]

The court further found that mere capacity without use was not enough since a ruling to that effect would effectively make any defendant liable simply for having such a system.

The U.S. District Court for the District of Maine indicated that it might take a similar approach to the capacity argument in *McEwen v. National Rifle Association*. There, the defendant had filed a motion to dismiss multiple TCPA claims, but not those relating to ATDS calls.[11]

In somewhat lengthy dicta, the court noted that after *Facebook*, "the ATDS portion of the claim requires an allegation that [the caller] used a random or sequential number generator to place calls," and pointed out that the plaintiff's complaint only alleged automatic dialing and "the capacity to store or produce telephone numbers to be called, not that it had "used a random or sequential number generator to place its calls."

Therefore, the court suggested that the plaintiff may not have adequately stated a claim on its ATDS theory, though it tabled the question for another day since the defendant had not raised the argument itself.

Path 4: Require Plausible Allegations of Both Automation and Randomness

In *Camunas v. National Republican Senatorial Committee*, the U.S. District Court for the Eastern District of Pennsylvania granted a motion to dismiss in May because the operative complaint did not sufficiently plead facts indicating use of an autodialer.[12] In *Camunas*, the court held it was inadequate to plead merely that a device "calls phone numbers from a stored list using a random or sequential number generator to select those phone numbers," or that the calls in question were "recurring autodialed marketing messages."

Instead, the pleading needed to identify details such as the content of the messages, the phone number from which they were sent, whether that number was a short code, and whether a prior relationship existed between the parties. The court allowed plaintiffs an opportunity to amend their complaint.

The U.S. District Court for the Middle District of Florida followed *Camunas* in *Perrong v. MLA International Inc.*,[13]

explaining, as *Camunas* did, that the plaintiff needed to allege "the random nature of the automation device."

Similarly, the U.S. District Court for the Northern District of Illinois dismissed *Watts v. Emergency Twenty Four Inc.*[14] with prejudice because the plaintiff had merely recited language from the TCPA and alleged a high volume of calls per day. The court ruled that the number of calls, without more, did not transform a dialer into an ATDS.[15]

Conclusion

Overall, the four months of decisions following the Supreme Court's *Facebook* opinion have provided glimmers of hope for TCPA defendants.

Time will tell whether more courts follow a common sense interpretation of *Facebook* and opt to release defendants on a motion to dismiss or require defendants to use summary judgment to prove the absence of a random or sequential number generator.

At this stage, however, federal courts seem on track to continue to take a pro-business approach, following the Supreme Court's decision closely, though courts in the Ninth Circuit may lean the other way.

On the other hand, businesses can also expect to see more states proactively taking steps to bolster their regulation of ATDS calls. Florida has already enacted a law to require express written consent for sales calls placed using an "automated telephone dialing system," which includes "an automated system for the selection or dialing of telephone numbers or the playing of a recorded message"[16] — notably broader than the federal definition.

In light of these anticipated changes, companies would do well to shore up their consent records, confirming or reconfirming consent to receive ATDS calls, in writing where possible, in order to minimize the risks associated with state law revisions and the minority of federal courts. Companies can then be freer to consider other compliance strategies, such as recategorizing their telephony systems under the narrower federal rule, where applicable, to place additional calls.

---

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

[2] *Montanez v. Future Vision Bank*, No. 20-cv-02959 (D. Col. Apr. 7, 2021, report and recommendation aff'd Apr. 29, 2021).

[3] *Atkinson v. Pro Custom Solar LCC*, No. SA-21-cv-178 (W.D. Tex. June 16, 2021).

[4] *Miles v. Medicredit, Inc.*, No. 4:20-cv-01186 (E.D. Mo. July 14, 2021).

[5] *See also Gross v. GG Homes, Inc.*, No. 3:32-cv-00271 (S.D. Cal. July 8, 2021).

[6] 141 S. Ct. 1163, 1172 n.7 (2021) (internal citations omitted).

[7] *Timms v. USAA Federal Savings Bank*, No. 3:18-cv-01495 (D.S.C. June 9, 2021).

[8] *Hufnus v. DoNotPay, Inc.*, No. 3:20-cv-08701 (N.D. Cal. June 24, 2021).

[9] *Barnett v. Bank of Am.*, No. 3:20-cv-272 (W.D.N.C. May 28, 2021).

[10] *Barry v. Ally Fin., Inc.*, No. 20-12378 (E.D. Mich. July 13, 2021).

[11] No. 2:20-cv-00153, 2021 WL 1414273 (D. Me. Apr. 14, 2021).

[12] *Camunas v. National Republican Senatorial Committee*, No. 21-cv- 1005 (E.D. Pa. May 26, 2021).

[13] *Camunas* in *Perrong v. MLA International, Inc.*, No. 6:20-cv-01606 (M.D. Fla. July 2, 2021).

[14] *Watts v. Emergency Twenty Four, Inc.*, No. 20-cv-1820 (N.D. Ill. June 21, 2021).

[15] *See also Guglielmo v. CVS Pharmacy, Inc.*, No. 3:20-cv-1560 (D. Conn. Aug. 2, 2021) (dismissing TCPA claims because allegations of automation alone did not suffice to state a claim for unlawful ATDS use).

[16] Fla. S.B. 1120 § 1 (June 29, 2021), https://www.flsenate.gov/Session/Bill/2021/1120/BillText/er/PDF.

RELATED INDUSTRIES + PRACTICES

- Class Action
- Data + Privacy
- Privacy + Cyber
- Telephone Consumer Protection Act (TCPA)