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Eighth Circuit Holds Text System That Randomly Selects Phone Numbers From Database Does Not Qualify as ATDS

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On March 24, the Eighth Circuit Court of Appeals issued an opinion, upholding separate district court decisions finding that a system that sends promotional text messages to phone numbers randomly selected from a database of customer information is not an automatic telephone dialing system (ATDS) under the Telephone Consumer Protection Act (TCPA). The concise opinion espouses a common sense reading of the word "produce," finding that the word requires an ATDS to generate a random number, rather than to select a number randomly.

District Court Decisions

In two separate decisions from the Western District of Missouri, plaintiffs Colby Beal and Zachary Smith alleged that they received promotional text messages from separate bar establishments, both of which used marketing software called "Txt Live." The Txt Live software includes a database that stores contact information. The defendants' employees manually entered contact information, including phone numbers, into the database — a system without the capacity to randomly or sequentially generate phone numbers.

To send mass text messages, Txt Live users filter the recipients, select the number of potential customers, draft the content of the text message, then hit "send." The system then shuffles through target contacts, a process the court likened to shuffling a deck of cards, then selects recipients from the top of the list. Both district court judges concluded that the "number shuffling" did not constitute random selection of telephone numbers to be called.

Eighth Circuit Decision

The Court of Appeals upheld the district courts' decisions, focusing on the meaning of the word "produce" in the statute and finding that the TCPA requires a system to "produce" by "*generating* a random number." And, because the Txt Live system does not generate phone numbers to be called, it does not "produce telephone numbers to be called" under the statute. Though the appellants argued that this reading edits the statute to write in the word "generated," the court disagreed, finding that it "simply interpret[ed] the word 'produce,'" a word the court found does not include *selection* of numbers.

The court also found that the Supreme Court's opinion in *Facebook v. Duguid* "strongly bolstered" its findings. Not only did the Eighth Circuit conclude that the Txt Live system "is exactly the kind of equipment *Facebook* excluded" from the definition of an ATDS, the court also rejected the infamous "Footnote Seven" argument. Where the appellants' attorneys argued that Footnote Seven of the *Facebook* decision saved its argument that the Txt Live

system was an ATDS because it stored numbers to be dialed at a later time, the court disagreed. “Like other courts, we do not believe the [Supreme] Court’s footnote indicates it believed systems that randomly select from non-random phone numbers are Autodialers.” Rather, the system is simply one “that merely stores and dials phone numbers.”

The opinion is one of the first appellate decisions to interpret *Facebook* and, additionally, one of the first major opinions applying the Footnote Seven argument specifically to text messaging systems, as the majority of Footnote Seven arguments have been directed toward predictive dialers. In a circuit largely silent on TCPA issues pre-*Facebook*, the decision represents a succinct and no-nonsense summation of TCPA issues in the wake of the Supreme Court’s decision, resolving those issues in favor of TCPA defendants.

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