

Human Intervention Still Answers the Call: Northern District of California Curtails Text-Based TCPA Class Action

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Companies are continuing to reap the rewards of the Supreme Court's decision in *Facebook v. Duguid* earlier this year, in which the Supreme Court confirmed a narrow reading of the Telephone Consumer Protection Act's (TCPA) much-beleaguered definition of an automatic telephone dialing system (ATDS). In the latest victory, *Pascal v. Concentra, Inc.*, out of the Northern District of California, the district court granted summary judgment to the defendant company, holding that the text messages at issue in the class action had not been sent using an ATDS.

The plaintiff, Lawrence Pascal, claimed that Concentra's use of Textedly, a messaging application, constituted use of an ATDS. Concentra, however, provided evidence at summary judgment showing that the Textedly system not only did not generate numbers randomly or sequentially, the system also had all of the hallmarks of human intervention that courts relied upon pre-*Facebook*. To send messages through Textedly, subscribers like Concentra upload lists of telephone numbers to Textedly's platform, draft a message, schedule the transmission, and then activate the transmission. Textedly does not provide or generate any numbers itself. As the numbers are uploaded, Textedly's database assigns each an identification number, but does not change the order of the numbers or determine when any number will be contacted. According to the call logs, Pascal's number was texted in sequential identification number order. Pascal argued that because the phone numbers were assigned unique, sequential identification numbers, Textedly had used a random or sequential number generator to store telephone numbers, qualifying as an ATDS within the meaning of the TCPA.

Looking to recent decisions from the same court in *Hufnus v. DoNotPay* and *Tehrani v. Joie de Vivre Hospital*, the court ruled that because the phone numbers themselves are not produced randomly or sequentially, but are uploaded or manually input into Textedly, the Textedly system is not an ATDS. The court first explained that the statute's requirement that a "number" be stored or produced by an autodialer, it implicitly refers to *phone* numbers, not the database's identification numbers. As a result, "a platform that merely targets telephone numbers that were obtained in a non-random way is not an autodialer." Dismissing Pascal's arguments under Footnote 7 of the *Facebook* decision, the court explained that footnote, in context, referred to a technology that randomly dialed numbers from a pre-produced but also randomly generated list, while the Textedly system did not produce numbers randomly and the numbers were contacted in the same order they were uploaded to Textedly. Based on those undisputed facts, the court held that Concentra had not used an ATDS to text Pascal, granted Concentra's motion for summary judgment, and denied Pascal's cross-motion.

Though certain TCPA cases continue to sneak past the motion to dismiss stage, courts continue to apply a

common-sense reading of *Facebook* and are not swayed by attempts to expand Footnote 7 beyond its narrowly circumscribed purpose. While callers may still have to litigate through discovery, the likelihood of similar TCPA cases surviving the written motions stage continues to shrink. Finally, the stand-by of human intervention continues to pay dividends. *Facebook* may have provided clarity, but traditional evidence of consistent and repeated human intervention still holds sway with federal courts.

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