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Life After Facebook: District of South Carolina Holds Predictive Dialer Is Not an ATDS

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In one of the first major decisions after the Supreme Court's *Facebook v. Duguid* decision, a federal district court in South Carolina (the "Court") has ruled that the Aspect predictive dialer is not an automatic telephone dialing system (ATDS) under the Telephone Consumer Protection Act (TCPA) since it does not have "the capacity to use a random or sequential number generator to either store or produce phone numbers to be called." In *Timms v. USAA Federal Savings Bank*, the Court granted summary judgment to the defendant on June 9, and found that a predictive dialer that dials from a pre-populated list is not an ATDS since it does not have the capacity to produce or store numbers using a random or sequential number generator.

Background

In a unanimous decision issued on April 1, the Supreme Court held in *Facebook* that an ATDS requires a system to have the capacity to store a telephone number using a random or sequential number generator or to produce a telephone number using a random or sequential number generator. Namely, "a necessary feature of an autodialer under [the statute] is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called." The bottom line of the decision was plain: No random or sequential number generator, no ATDS.

Despite the simplicity of the Supreme Court's decision, plaintiffs' counsel have pointed to Footnote 7 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.

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

Some plaintiffs' counsel 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*. With the *Facebook* opinion only two and a half months old, courts now are beginning to issue opinions analyzing the Supreme Court's framework.

The *Timms* Decision

In granting summary judgment, the Court addressed the plaintiff's two arguments — capacity and Footnote 7 — and found both lacking. First, the Court rejected the plaintiff's argument that the defendant's internal documents proved that the dialer had the capacity to store or produce numbers using a random or sequential number generator. The Court noted that merely labelling the dialer an "auto-dialer" "does not in and of itself impact whether [the dialer's] functions actually qualify it as an ATDS" under the TCPA. Additionally, automatic dialing capabilities alone are not enough to transform a system into an ATDS after *Facebook.* Finally, the Court addressed the dialer's "predictive mode," which predicts when an agent will be available to take a call, ruling that automatic dialing from a preset list was distinct from storing or producing numbers using a random or sequential number generator.

Second, the Court discounted the plaintiff's reliance on Footnote 7 in the *Facebook* opinion. The plaintiff argued that a telephone system that uses a stored list of nonrandomly generated numbers may still be an ATDS if it uses "a random number generator to determine the order in which to pick phone numbers from a preproduced list." Yet the plaintiff's own pleadings acknowledged that the Aspect predictive dialer did *not* use a random number generator to determine the order in which numbers were dialed, but it dialed them "sequentially."

Further, the Court found that Timms had "take[n] [F]ootnote 7 out of context." Footnote 7, the Court explained, was written specifically to address Duguid's argument that a device that stores numbers using a random or sequential number generator will also necessarily produce numbers in the same way, rendering the inclusion of both "store" and "produce" superfluous. The Court specifically addressed the Supreme Court's references in the footnote — particularly a reference to the amicus brief of the Professional Association for Customer Engagement (PACE). The amicus brief 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. If, for example, the equipment randomly generated the number 13, the telephone system would dial the 13th telephone number on the stored list. A pre-produced list, however, is not a list that is sequentially generated and stored, meaning that the predictive dialer used by the defendant is not an ATDS.

Having disposed of the plaintiff's arguments, the Court granted USAA's motion for summary judgment.

Looking Forward

This decision provides a watershed moment following *Facebook*. While many plaintiffs' lawyers looked specifically to Footnote 7 as a way to save the TCPA litigation boon, the *Timms* opinion explains why the Supreme Court's ultimate holding — that telephone systems must use a random or sequential number generator to qualify as an ATDS — still means what it says. Time will tell whether other district and appellate courts follow in the *Timms* court's footsteps, but the decision provides reason for optimism.

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