Articles + Publications | October 18, 2023

Pa. Autodialer Decision Has Turned TCPA Tides in 3rd Circ.

WRITTEN BY

Virginia Bell Flynn | Ethan G. Ostroff | Stefanie H. Jackman | Susan N. Nikdel

Published in Law360 on October 18, 2023.

The U.S. Supreme Court's 2021 decision in *Facebook Inc. v. Duguid*[1] resolved a long-standing circuit split over the definition of an automatic telephone dialing system, or ATDS, under the Telephone Consumer Protection Act.

The court held that to constitute an ATDS under the TCPA, a dialing device must: "have the capacity either to store a telephone number using a random or sequential number generator," or "produce a telephone number using a random or sequential number generator."

Practically, the *Facebook* decision has reduced the number of ATDS-based lawsuits, as the court's narrow definition of an ATDS makes it more difficult for a plaintiff to prove a dialing device qualifies as an ATDS.

Last month, in a win for common sense, the U.S. District Court for the Eastern District of Pennsylvania adopted *Facebook*'s narrow ATDS definition in *Perrong v. Bradford*,[2] thereby adding another arrow in defense counsel's quiver in the fight against TCPA lawsuits.

Federal district courts in California, Michigan, Illinois, Texas, Washington and New Jersey, among others, have followed *Facebook* and dismissed claims alleging TCPA violations for text messages and phone calls made to specific individuals whose numbers were compiled into a preproduced list of phone numbers, as opposed to generated randomly by an autodialer.

Notably, the U.S. Court of Appeals for the Ninth Circuit held in *Borden v. eFinancial LLC* last year that under the TCPA's plain text, an ATDS "must randomly or sequentially generate telephone numbers, not just any number."[3]

However, while most interpreting courts have adopted the analysis in the *Facebook* decision, the U.S. Court of Appeals for the *Third Circuit in Panzarella v. Navient Solutions Inc.*[4] declined to apply *Facebook* and broadened the ATDS definition to a startling degree last year.

The Third Circuit determined that an ATDS "may include several devices that when combined have the capacity to store or produce telephone numbers using a random or sequential number generator and to dial those numbers."

Accordingly, under this broad ATDS definition, the Panzarella court held that the defendant's "equipment" included the server as part of an autodialer system.

Although the court in Panzarella broadened the ATDS definition, it also proceeded to determine the meaning of "use" as employed in section 227(b)(1)(A) of the TCPA.

The Third Circuit held that to use technology in a way that constitutes autodialing, "one must use its defining feature — its ability to produce or store telephone numbers through random- or sequential- number generation."

Therefore, the court held that because the defendant's dialing system had this capability, but did not use it, it did not violate the TCPA.

In March 2023, a troubling case out of the Eastern District of Pennsylvania expanded on the "use" issue. In *Smith v. Vision Solar LLC*,[5] the plaintiff's expert testified that the dialing system at issued used a random or sequential number generator because "[i]t used it first to load the list into – – or put the list into memory. It used it again to call the list as well."

Based on this testimony, the court found a triable issue existed not only as to whether the defendant's dialing system had the capacity to call using a random or sequential number generator, but also as to whether that capacity was actually used to place calls in the given case.

The post-*Facebook* landscape in the Third Circuit, and Eastern District of Pennsylvania specifically, has thus been quite daunting for TCPA defendants. However, several recent decisions out of the Eastern District of Pennsylvania, including *Perrong v. Bradford*, are starting to turn the tides.

In *Perrong*, the plaintiff alleged that the defendant, an elected official, violated the TCPA by calling his residential phone using a prerecorded message and an ATDS. He further alleged that his telephone number was registered with both the national and Pennsylvania Do Not Call registries.

As alleged in the complaint, between September 2019 and December 2020, the plaintiff received five calls from the same number.

The plaintiff did not answer or only heard dead air for the first four calls, but on the fifth call he allegedly heard a prerecorded political message.

The plaintiff's amended complaint alleged three counts for claimed violations of the TCPA: violating Title 47 of the U.S. Code, Section 227(b), by using a prerecorded message; violating Section 227(b) by using an ATDS; and violating Section 227(c) by placing a telemarketing call. The defendant moved to dismiss the amended complaint in its entirety.

Section 227(b) of the TCPA prohibits making "any call … using any automatic telephone dialing system or an artificial or prerecorded voice … for which the party is charged for the call." The amended complaint alleged that the defendant's fifth call played a prerecorded message.

Further, the plaintiff's residential line was assigned to a service that charged a ring charge of $.08 per call regardless of whether the call was answered. The court thus found the allegations satisfied the required elements of the statute.

The plaintiff next alleged that the defendant used a communications service to place the calls. According to the plaintiff, the defendant sent a proposed list of numbers to the communications service.

The communications system as alleged by the plaintiff "operates automatically in a sequential manner using CSV files, which are rudimentary Excel spreadsheets, and only permits users to customize such lists by adding single contacts to an existing list."

The court's analysis began with a thoughtful summary of *Facebook*. The plaintiff argued that the defendant's communication system randomly or sequentially called the numbers from the defendant's list.

After analyzing the statutory text as well as Third Circuit precedent, the court concluded that a system only qualifies as an ATDS if it generates the telephone numbers dialed rather than simply choosing numbers to call off an imported list. On that basis, the court granted the defendant's motion to dismiss the claim.

This interpretation is consistent with the Third Circuit's approach in *Panzarella*, where the court held that only calls placed using an automatic mode — which dialed randomly or automatically generated phone numbers — would violate the TCPA.

The court also granted dismissal of the plaintiff's third claim that the call at issue was a telephone solicitation or placed for telemarketing purposes.

In its analysis, the court looked to the dictionary definition of the word "encourage," and concluded that an informational call about a forum providing information about shopping for health insurance did not constitute telemarketing as defined in the applicable regulations.

As U.S. District Judge Joshua Wolson explained, "there's a difference between telling people about how to search for something and telling them what to choose."

The *Perrong* case is a win for TCPA defendants across the nation. But there is an interesting argument that the message at issue should have been immune from the TCPA's reach by virtue of the Federal Communications Commission's finding that official state messages are not subject to the statute.

The court, however, held that it could not conclusively decide this issue at the pleading stage. This ruling is inconsistent with other courts that have granted motions to dismiss TCPA claims against government officials.

For example, in *Cheng v. Speier* last year,[6] the U.S. District Court for the Northern District of California dismissed the plaintiff's TCPA claim against Rep. Jackie Speier, D-Calif., in her official capacity on the basis of sovereign immunity.

Nonetheless, although courts across the country continue to differ, even post-*Facebook*, on how they define an

ATDS, the *Perrong* case provides defense counsel additional case law ammunition that narrowly interprets the definition of an ATDS in light of Facebook.

Indeed, defense counsel can now argue that a majority of interpreting courts have adopted the analysis in the *Facebook* decision.

Additionally, the *Perrong* court's observation of the difference between informational calls and telemarketing calls may also serve as an additional shield to limit the applicability of TCPA liability where calls placed purely for informational purposes are at issue.

Companies can implement TCPA compliance best practices by carefully drafting scripts that avoid any language overtly encouraging purchases or sales.

By steering clear of promotional content in favor of broad informational messaging, companies will strengthen the argument that their outbound communications do not qualify as telemarketing under the TCPA.

---

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

[2] *Perrong v. Bradford*, et al. , No. 2:23-cv-00510, 2023 WL 6119281 (E.D. Pa. Sept. 18, 2023).

[3] *Borden v. eFinancial, LLC*, 53 F.4th 1230, 1233 (9th Cir. 2022).

[4] *Panzarella v. Navient Sols., Inc.*, 37 F.4th 867 (3d Cir. 2022).

[5] *Smith v. Vision Solar LLC*, Case No. 20-2185, 2023 WL 2539017 (E.D. Pa. March 16, 2023).

[6] *Cheng v. Speier*, 609 F. Supp. 3d 1046, 1051(N.D. Cal. 2022).

RELATED INDUSTRIES + PRACTICES

- Consumer Financial Services
- Residential Solar Leasing + Finance
- Telephone Consumer Protection Act (TCPA)