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CLIENT ALERT

July 30, 2021

Buchalter TCPA Digest: More ATDS Cases Slip Past Pleading Stage, Plaintiffs Keep Trying to Leverage *Facebook*'s FN7, and Florida Enacts Not-so-"Mini" TCPA

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The TCPA and other related regulations over telemarketing and "robocalling" continue to evolve at a quick pace, creating uncertainty and posing challenges for any business that contacts consumers through calling or texting. This past month has seen more important developments in the wake of the Supreme Court opinion in *Facebook v. Duguid*, which gave us a narrow interpretation of the statutory ATDS definition. There have also been important developments at the state level, with Florida's passage of a beefed-up telemarketing law, now featuring a private right of action that mirrors the TCPA.

This digest will provide readers with a rundown of these important developments, along with insights on practical impacts, and other helpful takes.

Development 1: *Courts continue to show leniency in allowing ATDS cases to pass the pleading stage, even with the Supreme Court's narrow ATDS interpretation.*

Rundown: Courts affording plaintiffs leniency in pleading ATDS use isn't exactly a new thing. What is important to know now is that the trend continues, even with the benefit of the narrow ATDS definition in *Facebook*. Since that opinion in April of this year, a number of courts have found fairly generic allegations of ATDS use enough to survive motions to dismiss, largely on the basis that plaintiffs don't have the ability to know how the defendant's system really operates without discovery. In some cases, courts have found allegations of a "pause" when answering the phone to be enough to plausibly plead ATDS use. See e.g. *Callier v. Greensky, Inc.*, No. EP-20-CV-00304-KC, 2021 U.S. Dist. LEXIS 126769 (W.D. Tex. May 10, 2021). Others have held allegations of generic messages to pass muster. See e.g. *Gross v. Gg Homes*, No. 3:21-cv-00271-DMS-BGS, 2021 U.S. Dist. LEXIS 127596 (S.D. Cal. July 8, 2021).

Practical Impact: More often than not, individual and class action TCPA lawsuits based on allegations of ATDS use are going to slip past the pleading stage. This means lawsuits are going to take longer, and cost more to defend since they will need to be pushed through discovery, and to the summary judgment phase. But on the bright side…

Development 2: *Defendants have had some early success beating the Footnote 7 argument.*

Rundown: The *Facebook* opinion contains a less-than-ideally worded footnote paraphrasing a point made in an amicus brief about how an old-school random dialer from the early 90's functioned. Plaintiffs

have attempted to capitalize on this footnote to argue that a dialing system meets the statutory ATDS definition if it "uses a random or sequential number generator," to pick the order in which numbers are dialed from a "preproduced list." So far, all but one court to have addressed this argument has refused to bite. Three courts have provided well-reasoned rulings rejecting this interpretation of FN7 as out-of-context. See *Barry v. Ally Financial*, No. 20-12378, 2021 U.S. Dist. LEXIS 129573 (E.D. Mich. July 13, 2021); *Hufnus v. Donotpay, Inc.*, 2021 U.S. Dist. LEXIS 118325 (N.D. Cal. June 24, 2021); *Timms v. USAA*, No. 3:18-cv-01495-SAL, 2021 U.S. Dist. LEXIS 108083 (D.S.C. June 9, 2021). One court, in a cursory footnote, suggested under FN7 a predictive dialing system might be an ATDS. *Carl v. First Nat'l Bank*, No. 2:19-cv-00504-GZS, 2021 U.S. Dist. LEXIS 111889, at *21 n.10 (D. Me. June 15, 2021).

Despite these early losses, plaintiffs continue to push discovery into dialer functionality. In one recent decision, a court allowed a plaintiff to subpoena a dialing software developer for the *source code* of the dialing system. *In re Portfolio Recovery Assocs., LLC*, No. 11md2295 JAH (BGS), 2021 U.S. Dist. LEXIS 137842 (S.D. Cal. July 22, 2021).

Practical Impact: Even though a plaintiff's case might slip past the pleading stage, it will have a tougher time surviving summary judgment. If this trend keeps up, it will become harder for courts to accept the out-of-context interpretation of Footnote 7 being advanced by plaintiffs. Even so, defendants will need to be prepared to face situations where plaintiffs will be drilling down in discovery—potentially all the way to the dialer's source code—on dialer functionality. To mount an effective defense, defendants should scope this technical information as early as possible, and consult with an expert as part of a proactive summary judgment strategy.

Key Development 3: *Florida is the star of the show as it amends its telemarketing law to add a private right of action, a broad restriction on "automated systems," and other tighter rules.*

Rundown: Florida's new telemarketing rules became effective June 1, 2021. Florida made several changes to its rules, including:

1. The amendment added a private right of action that mirrors the TCPA, and allows a consumer to sue for $500 up to $1,500 per call/texts;
2. Florida law now broadly prohibits "telephone sales calls using an automated system for the selection or dialing of telephone numbers," without the prior express written consent of the called party;
3. Time limitations for calls have been tightened to between 8:00a.m. and 8:00 p.m.;
4. Callers cannot make more than three calls to the same number in a 24-hour period; and
5. The law builds in a presumption that calls made to a Florida area code are made to a Florida resident.

Practical Impact: Any business that calls or texts a consumer to market something needs to pay attention. The stakes are now higher in Florida, one of the most populous and litigious states in the country. The class action lawsuits have already started as a result of Florida's new private right of action, and this law has some teeth.

Because the statute broadly prohibits the use of an "automated system for the selection . . . of telephone numbers," it is possible the law may be broad enough to encompass click-to-dial systems that automate the selection or sequencing of the phone numbers that agents manually dial with a click. Companies

should pause and consider whether to treat these types of calls as falling within Florida's amended telemarketing law, and therefore requiring prior express written consent to make.

In addition, the combination of tighter time restrictions, and the introduction of a presumption that a call to a Florida area code is a call to a Florida resident, has created some difficult questions for businesses in figuring out the consumer's applicable time zone. Florida itself has area codes in two different time zones, and things can become more complicated when deciding what to with a consumer with a Florida area code, but address information in another state.

The good news is: (a) the new regulations apply only to sales calls, so calls/texts for informational and debt collection purposes are mercifully not regulated; and (b) the across-the-board maintenance of good old fashioned consent and revocation protocols remains an effective risk mitigation tool, even for this beefed-up state law.

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Big Picture Takeaways

While *Facebook* delivered some relief in the context of litigation risk, there are still plenty of reasons for callers to maintain basic compliance protocols through ensuring the appropriate level of consent before calling, and honoring consumer requests to stop calls. While defendants may continue their winning streak on the FN7 issue, there is still enough uncertainty in the mix that weighs against any drastic shifts in compliance protocols.

Keeping focus on TCPA compliance is particularly important for companies that market to consumers through phone calls or text messages. This category of calls is not only still subject to the TCPA's National Do Not Call Registry rules, but now more onerous state-level regulations, including Florida's amended telemarketing law. Regulations on automated calling and telemarketing continue to evolve, and those evolutions may accelerate now with more changes at the state level.

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