

FACEBOOK, AND BEYOND

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State Bar of Texas
17TH ANNUAL
ADVANCED CONSUMER & COMMERCIAL LAW
September 23-24, 2021

CHAPTER 17

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education

Southern Methodist University Dedman
School of Law (J.D., 1987)

Miami University of Ohio (B.S., Finance,
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admissions

Texas

U.S. District Court for the Eastern District of
Texas

U.S. District Court for the Northern District of
Texas

U.S. District Court for the Southern District
of Texas

U.S. District Court for the Western District of
Texas

U.S. Court of Appeals for the Ninth Circuit

U.S. Court of Appeals for the Fifth Circuit

industries

Financial Services

Although I'm a litigator, I also understand the complexities of the regulatory framework because I am well versed in "alphabet soup" litigation. I can see how a problem needs addressing by both a litigator, which is a temporary fix, and our business banking group, which can lead to a permanent fix by correcting a systemic problem within the client's organization. I believe my previous experience both as an attorney at the Department of Justice and as in-house counsel at a large bank enhances my ability to help clients.

Gregg Stevens represents financial institutions, large national banks, lenders, credit card issuers, auto finance companies, and other organizations in commercial litigation and disputes stemming from the federal statutes pertaining to consumer financial services. With a deep well of knowledge on the "alphabet soup" laws, Gregg primarily defends clients involved in regulatory issues raised under the Fair Credit Reporting Act (FCRA), the Truth in Lending Act (TILA), the Fair Debt Collection Practices Act (FDCPA), and the Telephone Consumer Protection Act (TCPA), as well as under the state Unfair

affiliations

Professional

- American Bar Association, Committee on Consumer Financial Services
- Association of Credit and Collection Professionals (ACA), Members' Attorney Program
- Dallas Bar Association
- Texas Bar Foundation, Fellow
- State Bar of Texas

Community

- Temple Shalom, General Counsel. Pro Bono
- Plano Wildcats Hockey Association, President, 2018–2019

or Deceptive Acts or Practices (UDAP) laws, among others.

Gregg also advises companies in disputes centered on issues such as credit acceptance, mortgage fraud, credit card fees and practices, consumer leases, payday loans, debt collection practices, credit reporting, and application of credit card payments. He frequently helps financial institutions obtain recoveries from debt elimination scam promoters.

Gregg's previous experience manifests in his current practice. He spent several years with the Department of Justice Tax Division, litigating federal tax cases on behalf of the United States in federal courts in Texas and New Mexico, and then served as in-house counsel at a large national bank. Gregg makes a point of getting to know his clients well, and he communicates frequently with them about their needs, concerns, and problems. With a perspective gained from in-house experience, Gregg appreciates that the business solution is often preferable to the legal solution, and he always factors the client's goals and financial standing into his strategies. He relates to his clients and their concerns because he has been in their shoes and knows what it's like to feel pressure to contain costs and settle cases quickly.

Drawing on his knowledge about the regulatory landscape, Gregg frequently speaks to clients and national audiences on consumer financial services litigation topics. He also writes about consumer credit issues for legal publications.

presentations

"Is the TCPA Robocall Restriction Enforceable?" McGlinchey webinar, December 3, 2020

"Credit Reporting in the Pandemic Era," 2020 Virtual Consumer Finance Legal Conference, November 11, 2020

"Efforts to Minimize Liability under the FCRA," 2020 Virtual Consumer Finance Legal Conference, October 9, 2020

"The Evolving TCPA Landscape and Circuit Court Splits," 2020 Virtual Consumer Finance Legal Conference, October 9, 2020

"TCPA and the First Amendment," Texas Bar CLE's 16th Annual Course Advanced Consumer & Commercial Law, August 28, 2020

"FCRA Litigation Pitfalls to Watch Out For," AccountsRecovery.net webinar, May 26, 2020

"FCRA Hot Topics Including Furnisher Issues and Other Developments," 2019 Consumer Finance Legal Conference, New Orleans, LA, October 15, 2019

"TCPA Judicial Developments, the FCC's Recent Regulatory Initiatives, and their Impact on Related Communications," 2019 Consumer Finance Legal Conference, New Orleans, LA, October 14, 2019

"Scared Straight: Avoiding Grievances," Texas State Bar 15th Annual Course on Advanced Consumer & Commercial Law, Austin, TX, September 5, 2019

"The Telephone Consumer Protection Act (TCPA) Litigation Bubble: Evolving Technology, Record-Breaking Settlements, and Uncertain Legal Precedent," ACI's 30th National Forum on Consumer Financial Class Actions and Government Enforcement, Chicago, IL, July 16, 2018

"The Evolving Landscape of First Party Collections," The Conference on Consumer Finance Law Annual Consumer Financial Services Conference, Ft. Worth, TX, November 3, 2017

"FCRA and the CFPB: Managing Credit Reporting Disputes, Litigation, and Bankruptcy Reporting; Metro 2 Updates," 16th Annual Consumer Finance Legal Conference, New Orleans, LA, October 12, 2017

"Updates on TCPA, FCRA, and the CFPB," Independent Finance Association of Illinois, June 16, 2017

"Legal Developments in Federal Debt Collection, Private Education Loan Developments, and Limited English Proficiency," Client CLE Presentation, May 18, 2017

"A Closer Look at the CFPB's Proposals to Overhaul the Debt Collection Industry," 2017 ABA Consumer Financial Services Committee Winter Meeting, Carlsbad, CA, January 13, 2017

"The Fair Credit Reporting Act: From Reasonable Investigation to Permissible Purpose – How to Avoid & Successfully Defend FCRA Claims," 15th Annual Consumer Finance Legal Conference, New Orleans, LA, September 30, 2016

"Litigating and Trying Cases Under the Fair Credit Reporting Act," 12th Annual Advanced Consumer & Commercial Law Course, TexasBarCLE, Austin, TX, September 15, 2016

"The Fair Credit Report Act: From Reasonable Investigation to Permissible Purpose – How to Avoid, and Successfully Defend, FCRA Claims," Client Presentation, Plano, TX, August 29, 2016

"The Fair Credit Reporting Act: From Reasonable Investigation to Permissible Purpose – How to Avoid and Successfully Defend FCRA Claims," 2016 ACA International Convention & Expo, Denver, CO, June 17, 2016

"FCRA Update," Comenity Bank, Columbus, OH, April 2015

"The Telephone Consumer Protection Act - What's Debt Got to Do with It?" 10th Annual Advanced Consumer & Commercial Law Course, TexasBarCLE, Austin, TX, September 12, 2014

"Update on FDCPA and TCPA," Consumer Credit 2011, The Credit Law Institute and The Conference on Consumer Finance Law, October 27, 2011

"Open-End Credit Issuer Legislation and Trends in Credit Card Litigation," 10th Annual Consumer Finance Legal Conference, October 20, 2011

"Update on FCRA Issues and Developments," Consumer Credit 2010, The Credit Law Institute and Conference on Consumer Finance Law, October 28, 2010

"Debt Collection and Servicer Compliance Issues in an Electronic Age; Servicer and Debt Buyer Licensing; Collection Litigation Issues," 9th Annual Consumer Finance Legal Conference, October 21, 2010

"Combating Closing Table Fraud: Tactics for Successful Identification and Reporting," October Research Corporation webinar, October 7, 2010

"Arbitration: What's Left," Suing, Defending, and Negotiating with Financial Institutions, February 25, 2010

"Servicing Litigation, Debt Collection Compliance and Licensing Issues Under State and Federal Law," 8th Annual Consumer Finance Legal Conference, October 22, 2009

"Other FCRA Developments and Litigation - Red Flag ID Theft Rules and Issues," Credit 2008, The Credit Law Institute and Conference on Consumer Finance Law, November 7, 2008

"FCRA Developments and Litigation," Consumer Credit Conference, Dallas, TX, November 9, 2007

"Debt Elimination Scams," Houston Bar Association, Houston, TX, October 10, 2007

"Fair Debt Collection Practices Act," Dallas, TX, October 2007

"Fair Credit Reporting Act Teleconference," Lorman, Dallas, TX, September 18 and March 21, 2007

"Debt Elimination Scams," Consumer Credit Conference, November 9, 2006

"Drafting and Enforcing Arbitration Provisions: Recent Trends," 3rd Annual Consumer Finance Legal Conference, New Orleans, LA, September 9, 2004

"Identity Theft," Consumer Credit Update, Fall 2003

published articles

"Constitutionality of the TCPA Between 2015 and 2020," ABA Litigation Section *Consumer Litigation*, Volume 2, Number 1, Summer 2021

"Courts Rule on Constitutionality of TCPA Robocall Restriction," *ABA Business Law Today*, November Month-In-Brief: Business Regulation & Regulated Industries, November 2020

"Navigating the FCRA in the heavy wake and possible undertow of the CARES Act changes to the FCRA," Westlaw's Consumer Financial Service Law Report, May 5, 2020

"Mitigating risk in pulling credit reports," Auto Finance Excellence, March 2, 2020

Co-author, "Chapter 3: Fair Credit Reporting Act" and "Chapter 11: Credit Cards," *Consumer Financial Services Answer Book (2020 Edition)*, PLI, October 17, 2019

"Credit Reporting Dispute Investigations in the Wake of Felts," ABA Business Law Section Consumer Financial Committee Newsletter, March 25, 2019

Chapter Author, *Consumer Financial Services Answer Book (2017 Edition)*, PLI, September 1, 2017

"Confidentiality in Settlement Agreements Is a Virtual Necessity," GPSolo, Vol. 29, No. 6, November/December 2012

"Impact of the TCPA and the FDCPA on Debt Collection: Current Issues and Recent Developments 2012," *Consumer Finance Law Quarterly Report*, Vol. 66, Nos. 1-2

"Fair Credit Reporting Act Update," *Consumer Finance Law Quarterly Report*, Vol. 65, Nos. 1-2, Spring/Summer 2011

"Anatomy of a scam: How Chase Bank won injunction, damages against promoter of debt elimination scheme," *Consumer Financial Services Law Report*, Vol. 12, No. 13, December 2008

"Post-Bankruptcy Credit Reporting: What Should Be Done?" *Banking & Financial Services*, Vol. 27, No. 6, June 2008

"The Impact of TILA on the Debtor-Creditor Relationship," *Consumer Finance Law Quarterly Report*, Vol. 61, No. 2, Summer 2007

"Debt-Elimination Scams," *The Review of Banking & Financial Services*, October 2006

"Identity Theft," *Consumer Credit Update*, Fall 2003

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FACEBOOK, AND BEYOND

For last year's Advanced Consumer and Commercial Law seminar, we published an article that discussed the current state of the law surrounding Automated Telephone Dialing Systems ("ATDS"). We discussed that the United States Supreme Court accepted the *Facebook, Inc. v. Duguid* out of the 9th Circuit and would address the issue in the upcoming term. On April 1, 2021, the United States Supreme Court decided Facebook in a 9-0 decision. This paper will discuss the *Facebook/Duguid* decision and survey the current state of the law post-*Facebook*.

Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021).

Duguid challenged a Facebook security feature that sends users a notification via text message when an attempt is made to access their Facebook account from an unknown device or browser. To do so, Facebook users were required to provide a cell phone number to opt into this service. Duguid alleged that because this system could store and dial telephone numbers, it was an ATDS, and thus Facebook was liable for violations of the Telephone Consumer Protection Act ("TCPA"), even though the system did not use a random or sequential number generator.

The case was considered by the U.S. Supreme Court to resolve a split among the Circuits. The main issue centered on whether the definition of an automatic telephone dialing system in the TCPA encompassed any device that could store and automatically dial telephone numbers, even if the device did not use a random or sequential number generator. The Supreme Court, via unanimous decision, opting for the narrow interpretation that an ATDS is a device that has the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator.

This was important because the TCPA restricts certain calls made by an "autodialer," which the TCPA defines as "equipment that has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers." The Opinion, authored by Justice Sotomayor, stated that "the clause 'using a random or sequential number generator' modifies both verbs that precede it ('store' and 'produce') and therefore **a system which neither stores nor produces numbers' using a random or sequential number generator' is not an autodialer.**" The high Court clarified that, **"the definition of an autodialer requires that in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator."** (emphasis added).

In addition to the above, footnote 7 addressed Duguid's argument that "such an ATDS device would necessarily 'produce' numbers using the same generator technology, meaning the term 'store or' in §227(a)(1)(A) is superfluous." The Court explained, however, that "it is no superfluity, however, for Congress to include both functions in the autodialer definition so as to clarify the domain of prohibited devices. *BFP v. Resolution Trust Corporation*, 511 U. S. 531, 544, n. 7, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994). For instance, an autodialer might use a random number generator to determine the order to pick phone numbers from a pre-produced list. It would then store those numbers to be dialed at a later time. See Brief for Professional Association for Customer Engagement et al. as *Amici Curiae* 19. Even if the storing and producing functions often merge, Congress may have "employed a belt and suspenders approach" in writing the statute. *Atlantic Richfield Co. v. Christian*, 590 U. S. ___, ___, n. 5 (2020) (*slip op.*, at 10, n. 5)."

Some claimants have cited footnote 7 for the proposition that a caller's system could still be considered an ATDS where the platform "determined the order in which to pick phone numbers from a pre-produced list." As the following case summaries demonstrate, many courts have held that this interpretation is taking footnote 7 out of context and is at odds with the holding and rationale in *Facebook*.

Since the decision in *Facebook*, courts across the nation have applied the new, more narrow definition of what constitutes an ATDS, as follows:

Barry v. Ally Fin., Inc., No. 20-12378, 2021 U.S. Dist. LEXIS 129573 (E.D. Mich. July 13, 2021). Barry filed this putative national class action alleging, that Ally Financial violated the TCPA by placing calls to cell phone numbers belonging to non-customers, using an ATDS, without the recipient's consent.

This case was stayed pending the decision in *Facebook*. After *Facebook*, the court lifted a stay, and ordered Barry to show cause why *Facebook* was not controlling. Barry responded by conceding that her number was likely called from a stored list (and thus not randomly or sequentially generated) but claimed that her TCPA claims were not conclusively precluded as long as the dialing system had the *capacity* to store or produce numbers using a random or sequential number generator, even if it does not randomly or sequentially generate numbers. Plaintiff further cited Footnote 7 in *Facebook* in support of her contention that the Supreme Court raised the possibility that a system will

qualify as an ATDS if it uses a random number generator to determine the order to pick phone numbers from a pre-produced list.

The district court dismissed Barry's claims and held that the Supreme Court's decision in *Facebook* controlled, reasoning that the Supreme Court "plainly held that 'a necessary feature of an autodialer under § 227(a)(1)(A) is the capacity to use a random or sequential number generator to either store or produce numbers to be called.' *Facebook*, 141 S. Ct. at 1173. Plaintiff expressly concedes in her Response that '[her] number was likely called from a stored list,' and thus it was not randomly or sequentially generated." The district court also disagreed with Barry's "capacity to store or produce numbers using a random or sequential number generator" argument, stating that "to accept Plaintiff's argument that she only has to show that the auto-dialing system used by Defendant has the capacity to use a random or sequential number generator, even though she concedes that such alleged capacity was *not used* to make the calls to her...would have the effect of imposing liability on a defendant whenever it has such a system, with admittedly no nexus to the alleged harm to the plaintiff." The court went on to say that emphasized that "Congress' definition of an autodialer requires that, in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator."

In closing, the district court addressed Footnote 7 argument:

Plaintiff takes footnote 7 out of context. Footnote 7 appears in a section of the Supreme Court's Opinion addressing, and rejecting, Duguid's counterargument that the phrase "using a random or sequential number generator" modifies only "produce," and not "store." *Facebook*, 141 S. Ct. at 1171. The Court used the line quoted by Plaintiff to explain how an autodialer might both "store" and "produce" randomly or sequentially generated phone numbers...Thus, the Supreme Court is discussing the process as explained in the amicus brief in footnote 7, in which the "preproduced list" is one that is "sequentially generated and stored."...Further, Plaintiff's constrained reading of footnote 7 conflicts with the Court's clear holding in *Facebook* that "a necessary feature of an autodialer under § 227(a)(1)(A) is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called." *Facebook*, 141 S. Ct. at 1173.

Barry, 2021 U.S. Dist. LEXIS 129573 at *17-*19.

Borden v. Efinancial, LLC, No. C19-1430JLR, 2021 U.S. Dist. LEXIS 153086 (W.D. Wash. Aug. 13, 2021). Borden filed his original complaint in this proposed class action asserting one cause of action on behalf of himself and a proposed class under the TCPA. Borden alleged that, while seeking an insurance quote on Progressive.com's website, he was directed to a page on eFinancial's website that requested additional information, including his phone number. After completing the eFinancial form, Borden clicked to proceed with receiving the rate quote, but that he did not see a message in fine print that stated: "...you consent to receive offers of insurance from Efinancial [sic], LLC at the email address or telephone number you provided, including autodialed, pre-recorded calls, SMS or MMS messages." Subsequently, after opting not to secure the insurance quoted, Borden began to receive marketing text messages, which he alleged were made using an ATDS in violation of the TCPA.

The court specifically focused on language from *Facebook* that: "[b]ecause Facebook's [text message] notification system neither stores nor produces numbers 'using a random or sequential number generator,' it is not an ATDS..." The district court also noted that the Supreme Court abrogated prior Ninth Circuit precedent holding an ATDS need only have the capacity to "store numbers to be called" and to "dial such numbers automatically."

Borden then filed a second amended complaint, claiming that eFinancial used a sequential number generator to: (1) determine the order in which to pick the stored telephone numbers from eFinancial's database; and, (2) populate sequential strings of numbers in a database field labeled LeadID, which were then stored and assigned to a telephone number and used to pick the order. Borden did not, however, allege that eFinancial generated random or sequential phone numbers to send text messages.

eFinancial sought dismissal of all claims, stating that Borden: (1) acknowledged that he provided his phone number to eFinancial and thus the phone number was not randomly or sequentially generated to allege the use of an ATDS, and (2) gave prior express consent to receive the text messages. Borden argued that: (1) *Facebook* did not require that a phone number be randomly or sequentially generated to plausibly allege the use of an ATDS; and, (2) that he did not expressly give consent to be contacted. The court dismissed Borden's TCPA claims with prejudice, reasoning that the allegations were insufficient to establish that eFinancial's system was an ATDS as defined by *Facebook*, simply because it used the system to select which stored phone numbers to dial and to populate the LeadID field in eFinancial's database. Furthermore, the court rejected Borden's argument relying on one line within footnote 7 [in *Facebook*], for the proposition that it was sufficient to allege that a random number generator determined the order in which to pick numbers from a pre-produced list.

Barnett v. Bank of Am., N.A., No. 3:20-cv-272-RJC-DSC, 2021 U.S. Dist. LEXIS 101171 (W.D.N.C. May 28, 2021). Barnett claims that Bank of America (BOA) called him over 300 times after defaulting on a credit card. The calls were received on Barnett's cell phone number he provided in the credit card application. Barnett orally granted BOA with permission to call his cell phone with auto-dialers and pre-recorded messages. Per the court's opinion, the evidence purportedly indicated that the calls were placed from a system storing phone numbers for bank customers, such that when a BOA agent uses the system, the system would deliver telephone numbers in a call list to the agent, and when the agent logs in the system begins calling customers who have defaulted on their accounts. There was no evidence that this system generated random or sequential numbers, or that it is capable of doing so.

Barnett filed a claim under the TCPA, stating that BOA used an ATDS to contact him. BOA responded that Barnett's claim under this Act failed on two independent grounds: (1) that BOA's dialing technology did not qualify as an automatic telephone dialing system as defined by the TCPA; and, (2) that Plaintiff consented to receive the calls in question. The court cited to *Facebook* in noting that, for equipment to qualify as an ATDS, the TCPA "requires that in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator." The court reasoned that the testimony on record showed that the numbers chosen for the calls were selected from a pre-existing list created based on criteria from the dialer administrators, rather than by random or sequential number generators.

The court held that BOA was entitled to summary judgment based on the Supreme Court's ruling in *Facebook*, along with the lack of any evidence that BOA's system used a random or sequential number generator, and BOA's affirmative evidence that the system did not use such a number generator. The court further held that, even if BOA's calling system were an ATDS for TCPA purposes, the TCPA claim would fail because Barnett legally consented to receive the phone calls.

Camunas v. Nat'l Republican Senatorial Comm., No. 21-1005, 2021 U.S. Dist. LEXIS 100125 (E.D. Pa. May 26, 2021). Camunas complained that the National Republican Senatorial Committee (NRSC) violated the TCPA when it sent multiple text messages to his cell phone, despite his cell phone number being on the federal Do Not Call Registry. Camunas did not describe the content of the alleged messages, other than to say the messages were "generic and obviously pre-written," and that the NRSC's website referenced using "recurring autodialed marketing messages" related to opt-in messaging. Camunas also complained that, "[u]pon information and belief, [the NRSC] uses dialing technology, which calls phone numbers from a stored list using a random or sequential number generator to select those phone numbers." Camunas did not identify the phone number from which the messages were sent or allege that the messages came from a number associated with the NRSC.

The district court reiterated the holding in *Facebook* that, to qualify as an ATDS, the device at issue must have the capacity to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator.

Hufnus v. Donotpay, Inc., No. 20-cv-08701-VC, 2021 U.S. Dist. LEXIS 118325 (N.D. Cal. June 24, 2021). Hufnus alleged violations of the TCPA. The district court granted the motion to dismiss, reasoning that the device used by DoNotPay to contact Hufnus merely processed phone numbers supplied by consumers when they signed up for DoNotPay's services. Notably, the platform only used phone numbers provided by consumers during DoNotPay's registration process and not phone numbers identified in a random or sequential fashion. The court held that the platform did not qualify as an autodialer under the TCPA based on the *Facebook* decision.

Hufnus attempted to use a line from footnote 7 of the *Facebook* opinion, which provided that "an autodialer might use a random number generator to determine the order in which to pick phone numbers from a pre-produced list. It would then store those numbers to be dialed at a later time." Hufnus argued DoNotPay's device used a random number generator to determine the order in which to pick from the list of consumer phone numbers, such that it did qualify as an autodialer. The court disagreed with this interpretation, stating that footnote 7 referenced an amicus curiae brief from the Professional Association for Customer Engagement for support, and said brief made clear that the "pre-produced list" of phone numbers referenced in the footnote was itself created through a random or sequential number generator. This differed from the "pre-produced list" of phone numbers used by DoNotPay, which was created by consumers providing their numbers while signing up for DoNotPay's services. Moreover, the court pointed out that Hufnus's reading of footnote 7 conflicted with the holding and rationale in *Facebook*, thus this argument failed.

Timms v. USAA Fed. Sav. Bank, No. 3:18-cv-01495-SAL, 2021 U.S. Dist. LEXIS 108083 (D.S.C. June 9, 2021). Timms asserted claims for violations under the TCPA, claiming that USAA called her repeatedly seeking to collect on two credit cards for ten months, without her consent. The court had initially heard competing dispositive motions on the TCPA claims, but denied both motions without prejudice to refile after the Supreme Court's *Facebook* ruling.

As a result, the court held that USAA's dialing system did not satisfy the statutory definition of an ATDS as clarified by *Facebook*, and that Timms's claims failed. USAA argued that neither system used stored or produced telephone numbers using a random or sequential number generator, and that both systems dialed numbers from a

specific list of numbers provided to USAA. Like other plaintiffs have attempted, Timms relied on a two-fold argument that: (1) the dialer must only have the *capacity* to store or produce numbers using a random or sequential number generator; and, (2) that footnote 7 in *Facebook* left open the possibility that the platform could be considered an ATDS if the random number generator determined the order in which the numbers were dialed from the pre-produced list.

The district court disagreed with Timms's contentions, stating that the telephone numbers were from USAA members from a pre-created list of targeted accounts, which were automatically dialed or dialed by an agent. The court also stated that Timms's evidence failed to suggest that USAA's systems stored numbers using a random or sequential number generator or produced numbers using a random or sequential number generator. Finally, the district court held, as other courts have, that Timms's interpretation of footnote 7 in *Facebook* was "out of context."

In addition to the above, some courts have declined to dismiss TCPA claims based on the new definition of an ATDS under *Facebook*, where defendants have sought dismissal via motion to dismiss at the pleading stage. In these instances, courts have recognized that whether a defendant uses an ATDS is subject to discovery, as it is a fact exclusively within the defendant's possession. For that reason, some district courts have held that it is reasonable to infer from the pleadings that a sequential number generator may have been used, and that such an inference is appropriately drawn at the pleadings stage by viewing the acts in the light most favorable to the plaintiff.

Gross v. GG Homes, Inc., No. 3:21-cv-00271-DMS-BGS, 2021 U.S. Dist. LEXIS 127596 (S.D. Cal. July 8, 2021). Gross alleged violations of the TCPA, for telephone calls and text messages received from GG Homes. While Gross provided no details related to the phone calls, she contended that GG Homes used an ATDS or "robo-dialer" to send the text messages to her cell phone. GG Homes filed a motion to dismiss under federal Rules of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(6) (failure to state a claim upon which relief can be granted).

The district court took note of the *Facebook* decision by the Supreme Court, but nonetheless refused to dismiss the TCPA claims related to an ATDS, stating that the "newly clarified definition of an ATDS is more relevant to a summary judgment motion than at the pleading stage." The court recognized that, "[w]hile additional factual details about [GG Homes's] equipment might be helpful, they are not required at the pleading stage.

Callier v. Greensky, Inc., No. EP-20-CV-00304-KC, 2021 U.S. Dist. LEXIS 126769 (W.D. Tex. May 10, 2021). Greensky sought dismissal of Callier's TCPA claims under Federal Rule of Civil Procedure 12(b)(6). Callier asserted that Greensky violated the TCPA by making a series of automated calls to Callier's cell phone. Callier claimed the calls were "non-emergency telemarketing robocalls to [his] cellular telephone number without his prior express written consent." He further alleged that the calls followed similar scripts, including the company listed on the caller ID, ten seconds of silence upon answering, and then connection to an agent. Greensky argued that Callier claims were nothing more than conclusory, vague allegations.

The district court recognized, per *Facebook*, a "TCPA claim does not lie whenever someone receives an unwanted call from an automated system; liability is triggered only if the automated system 'us[es] a random or sequential number generator' to store or produce the phone numbers that are called." Nonetheless, the court reasoned that Callier had adequately alleged a violation of the TCPA since he purportedly: (1) received multiple calls to his cell phone; (2) did not consent to these calls, and no emergency necessitated the calls; (3) affirmatively stated that each call was sent by an ATDS; and, (4) noted that each call followed a similar script. The court held that it was reasonable to infer from the pleadings that Greensky used a sequential number generator to place its calls, and that such an inference is appropriately drawn at the pleadings stage by viewing the acts in the light most favorable to the plaintiff.

Jance v. Homerun Offer, LLC, No. CV-20-00482-TUC-JGZ, 2021 U.S. Dist. LEXIS 143145 (D. Ariz. July 29, 2021). Jance claimed that he received 29 calls on his cell phone from an investor inquiring if he had any interest in selling his property. Jance alleged that every phone call came from a similar number other than the last two digits, which ranged from 17-29. For each call he answered, Jance claims he heard "a brief hesitation of several seconds" before the caller spoke to him. Jance stated he called back the numbers of the caller ID shown on his phone, and an automated answering system played an identical message for all of the different phone numbers. He also traced the inbound phone numbers and discovered they were attributed to a VoIP. On one of the calls, Jance was able to get the caller to identify the company making the calls as "Homerun Offer." As a result, Jance alleged violations of the TCPA, claiming that Homerun Offer called his cell phone number with an ATDS without his express consent. Homerun Offer filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), for failure to state a plausible claim.

Despite recognizing the Supreme Court's ruling in *Facebook*, the court "acknowledged 'the difficulty a plaintiff faces' in pleading the existence of such a system with specificity because it is 'a factual question that is not properly resolved without formal discovery or at this stage of the proceedings.'" Accordingly, the district court accepted Jance's factual allegations as true, viewing them in the light most favorable to plaintiff. The court reasoned that Jance had plausibly pled claims that Home Run Offer used an ATDS, based on: (1) allegations Jance "had no business relationship with Defendants, did not give Defendants his contact information, and did not consent to be contacted by Defendants;" (2) the phone numbers were attributed to VoIP; (3) misleading caller ID information; and, (4) a brief hesitation of

several seconds before the caller responded. Thus, the court dismissed Homerun Offer's motion to dismiss the TCPA claims related to an ATDS.