

David Schultz Analyzes in ARM Compliance Digest: Appeals Court Tosses TCPA Case Based on Footnote in Facebook Ruling

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In the November 28, 2022 edition of the *ARM Compliance Digest*, Hinshaw partner David Schultz discusses the impact of the Ninth Circuit's decision to affirm the dismissal of a case at the District Court level, holding that in order for technology to meet the definition of an automated telephone dialing system, it must generate and dial random or sequential telephone numbers, based on how the Supreme Court interpreted the definition in the Telephone Consumer Protection Act (TCPA):

Facebook v Duguid went a long way to limit TCPA claims based on the use of an automatic telephone dialing system (ATDS). It held that a necessary feature of an ATDS is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called. The opinion injected a small amount of uncertainty based on its Footnote 7, which included in it a statement that “an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list.”

The plaintiff in *Borden v eFinancial* relied on that sentence to allege a TCPA violation, claiming the defendant used a “sequential number generator” to pick the order in which to call customers who had provided their phone numbers. The Ninth Circuit Court of Appeals rejected the theory. It said that the portion of Footnote 7 relied on was “an acontextual reading of a snippet divorced from the context of the footnote and the entire opinion.” Pretty firm statement. It then explained that Footnote 7 explained how an ATDS could both “store” and “produce” telephone numbers without making the two terms superfluous.

The ruling was concise and it should put to an end to the “Footnote 7 theory.” We’ve already seen it being cited as additional authority in pending TCPA cases.

[Read the full November 28, 2022 edition of the AccountsRecovery.net Compliance Digest.](#)

“Appeals Court Tosses TCPA Case Based on Footnote in Facebook Ruling,” *ARM Compliance Digest*, November 28, 2022.

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