Developments in Telephone Consumer Protection Act Law Following *Duguid v. Facebook*

BY BECCA WAHLQUIST AND NATHAN JAMIESON

FOR OVER A DECADE, LITIGATION INVOLVing claims of autodialer abuse brought under the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227, have crowded the federal courts. Among other things, the TCPA addresses abusive telemarketing practices by restricting certain communications made with an "automatic telephone dialing system" or "ATDS." The TCPA defines such "autodialers" as equipment with the capacity both "to store or produce telephone numbers to be called, using a random or sequential number generator," and to dial those numbers.[1]

With available statutory damages of $500 to $1,500 per call or text message, lawsuits abounded claiming that improper use of a restricted ATDS should support statutory damages on a classwide basis. However, rather than focusing on spam "robocalls" from telemarketers, over the past decade, thousands of ATDS claims were brought against companies reaching out to their own customers, often with informational or transactional communications. A cloud of uncertainty hovered over these claims brought against companies across industries for targeted calls and texts directed to their own customers' phone numbers, and by 2019 a deep circuit court split emerged on the pivotal question of what equipment constituted an ATDS as defined by, and thus restricted by, the TCPA.

Then, on April 1, 2021, in *Facebook, Inc. v. Duguid* ("*Duguid*"),[2] the Supreme Court affirmed that TCPA-restricted ATDS dialers are those that generate a plaintiff's telephone number either randomly or sequentially.[3] That decision has been a game-changer for TCPA litigation centered on claims of illegal use of an ATDS.

Becca Wahlquist co-chairs the class action practice group at Kelley, Drye, & Warren LLP, where she is a partner. Nathan Jamieson is an associate at Kelley, Drye & Warren LLP.

History of the TCPA

In 1991, Congress enacted the TCPA after expressing concern that, with the advent of new technology capable of placing a massive volume of calls without any human involvement, telemarketers would either (1) tie-up the phone lines of emergency services or hospitals, preventing them from receiving life-threatening calls;[4] and/or (2) would tie-up cellular telephone numbers, causing the owner of the cellular number to incur high fees tied to cell phone and pager usage at that time.[5] The rationale behind the law underscores that the TCPA was enacted during a very different technological era, and is now thirty-one years removed from today's modern technologies.

The telemarketing calls and faxes that the TCPA was designed to curtail were made by aggressive marketers employing tactics—such as random number generation or sequential dials—that systematically worked through every possible number in an area code, with the hope of getting someone to answer the phone or look at a fax with a marketing pitch for a product or service. The TCPA was intended to curb such abuse by extending a private right of action to those who received such calls. The statute, however, largely sat dormant for the first few decades after its 1991 passage, until litigation growth under the statute began exploding after 2010.

Over the past decade, American businesses discovered that if they reach out to customers via call, text, or facsimile for any reason, their company is at risk of being sued under the TCPA under the private right of action, even for communications wholly unrelated to marketing. Thus, the small business that sent 5,000 faxes finds itself being sued for a minimum of $2.5 million dollars; the restaurant that sent 80,000 text coupons is sued for trebled damages of $120 million dollars; and the bank with 5 million customers finds itself staring at $2.5 billion in minimum statutory liability for just one call placed to each of its customers. With the potential for a substantial monetary bounty, the number of TCPA lawsuits (many of them nationwide class actions) increased exponentially over the past decade.

Background of ATDS Restrictions

The TCPA prohibits any person from calling a cellular telephone number without prior consent "using any automatic telephone dialing system."[6] In turn, the statute defines "automatic telephone dialing system" as "equipment which has the capacity" to store and dial telephone numbers "using a *random or sequential number generator*."[7] With hundreds of district courts across the country being asked to interpret ATDS claims, and with inconsistent guidance from the Federal Communications Commission ("FCC") on the meaning of ATDS and the development of new technologies, it is no wonder that opinions began deviating dramatically as to what equipment triggered potential liability even though, as the Supreme Court has now held, the statutory definition of ATDS is clear.

Before *Duguid*, district courts inconsistently applied this definition, with some courts extending the ATDS definition

to a device that used any computerized technology to make calls or text messages. Many courts refused to dismiss TCPA claims when it was clear that targeted calls were at issue, and the business did not *randomly* or *sequentially* generate the plaintiff's telephone number; and then, in a 2012 order from the FCC, that agency held that the TCPA's definition of an ATDS "covers any equipment that has the specified *capacity* to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists."[8]

District courts consequently grappled with whether the TCPA prohibited the use of technology that *could* generate telephone numbers randomly or sequentially, or had the "capacity" to do so, even if the business had not used its technology in this manner. For instance, in 2013, a district court in the Northern District of Alabama commented that, " 'Congress included a definition that provides that in order to qualify as an automatic telephone dialing system, the equipment need only have the capacity to store or produce number.'"[9] Other courts agreed that whether the business actually used the technology in that capacity is "irrelevant."[10]

The issue of "what is an ATDS?" eventually split in the Circuit Courts of Appeal. In divergent appellate opinions that began issuing in 2019, the Second, Sixth and Ninth Circuits concluded that the definition of an ATDS encompasses any equipment that "stores" telephone numbers and reaches out to cellular numbers from a stored list. Indeed, the Ninth Circuit concluded that "a system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it."[11] On the other hand, however, the Third, Seventh and Eleventh Circuits held that the grammar and legislative history of the TCPA make clear that the statute limits liability only to equipment that randomly or sequentially generates the phone numbers to be called.

Thus, defendants accused of TCPA violations found themselves with potentially no liability in some federal circuits, and potentially company-annihilating liability in others, for the exact same calls and texts. On July 9. 2020, the Supreme Court agreed to take up the question of "what is an ATDS?" by granting certiorari in *Facebook, Inc. v. Duguid*, to consider this question that would impact thousands of pending litigations nationwide.

The Supreme Court's *Duguid* Decision

The underlying facts before the Court in the *Duguid* decision involved text alerts that had been sent by Facebook to Noah Duguid's cellphone number to attempt to alert the Facebook user who had provided Duguid's number that unknown devices or browsers were attempting to access the user's account.[12] In March 2015 Duguid filed a putative class alleging that he was not a Facebook user, and that the login-notification messages he and putative class members received violated the TCPA's prohibition on calls made with an ATDS without prior express consent. Given the Ninth Circuit's position already articulated in 2018 that any device that can store telephone numbers to be called and dial those numbers is an ATDS,[13] when considering Duguid's claims, the Ninth Circuit held that Duguid had sufficiently alleged use of an ATDS in the texts he received.[14]

On April 1, 2021, a unanimous Supreme Court reversed the Ninth Circuit's opinion regarding the statutory definition of ATDS and instead specifically affirmed the holdings of the Seventh and Eleventh Circuits. In so holding, the Supreme Court agreed that an ATDS is a system that calls "'using a random or sequential number generator.'"[15]

The Court recognized that Congress intended to prohibit only a small swath of conduct in its ATDS restrictions – that of the specific kind of autodialers that generated random/sequential numbers to call, which was uniquely harmful because "[i]t threatened public safety by 'seizing the telephone lines of public emergency services.'"[16] Indeed, such a number generator "could simultaneously tie up all the lines of any business with sequentially numbered phone lines."[17] The Court, therefore, affirmed that Plaintiff's ATDS allegations regarding text messages he received from Facebook could not be supported when Facebook was only texting a number that one of its customers had previously provided, and thus Facebook had not generated that consumer's phone number *randomly or sequentially*. The Supreme Court highlighted that the mere fact that Facebook used technology that randomly decided to text the plaintiffs' phone number did not mean that Facebook randomly or sequentially generated the plaintiff's telephone number.

Put simply, in agreeing that Facebook did not use an ATDS when sending targeted text messages to a customer-provided number, the *Duigid* Court affirmed that a business could have TCPA liability for using ATDS *only if* the business had used technology to randomly or sequentially generate the plaintiff's telephone number.

District Courts' Varied Applications of *Duguid* on Motions to Dismiss

Despite the clear language of *Duguid,* over the past year, federal courts have struggled with how to apply it at the pleadings stage. To date, at least 65 lower courts have considered the impact of *Duguid*, as well as one decision from the Ninth Circuit Court of Appeals and one from the Eighth Circuit Court of Appeals. 50 of those decisions were on motions to dismiss: 22 district courts refused to dismiss ATDS-based complaints on the pleadings, but 28 courts dismissed ATDS-based TCPA cases on the pleadings after recognizing that the plaintiff had insufficiently pled the use of ATDS. With the exception of the two appellate decisions, the other 15 decisions focused on summary judgment.

The two Circuit Court of Appeals decisions to issue as of the drafting of this article, *Meier v. Allied Interstate LLC* and *Beal v. Outfield Brew House, LLC*, both affirmed the Supreme Court's holding that a business is exposed to TCPA liability based upon the use of ATDS only if the defendant

used its ATDS to "produce the numbers it dials using a random or sequential number generator."[18] But some district courts are unwilling to wade into the ATDS questions at the early stages of a litigation, forcing defendants to proceed into discovery even if complained-of calls or texts were clearly targeting the defendant's own customer.

Some District Courts Reluctant to Dismiss on the Pleadings. Particularly in the months after *Duguid* issued, district courts appeared reluctant to dismiss ATDS-based claims on the pleadings, often opting instead to punt this determination to summary judgment. For instance, in refusing to dismiss the complaint due to the plaintiff's conclusory ATDS allegations, the district court in *Montanez v. Future Vision Brain Bank, LLC* noted that, "[w]hile the Supreme Court's decision elucidates the definition of an ATDS, that holding will prove far more relevant on a future motion for summary judgment than it does now."[19] The decision in *Atkinson v. Pro Custom Solar LCC* followed the same result, with the court refusing to dismiss the complaint before the plaintiff had the opportunity to use discovery to uncover the type of technology that the defendant used.[20]

Other courts that have refused to dismiss on the pleadings have conflated predictive dialing with ATDS. For instance, in *Callier v. GreenSky, Inc.*, the court ruled that a several-second delay before the plaintiff was ultimately connected with a live agent, a delay that often evidences the use of predictive dialing, permitted an inference that the defendant had used ATDS at the pleading stage.[21] The court in *Jance v. Homerun Offer LLC* also focused on the several-second delay to conclude that the plaintiff had sufficiently pled the use of ATDS at the pleading stage.[22] In *Stewart v. Network Capital Funding Corporation*, a district court in the Central District of California refused to dismiss the complaint on the pleadings because the complaint "is not devoid of any basis to infer that the type of predictive dialer alleged to have been used is not also a random or sequential generator," although the court did not identify that particular basis.[23]

Despite these decisions, however, "predictive dialers include a wide variety of devices, some of which do not qualify as an ATDS under the TCPA" and some of which do because they lack the capacity to randomly or sequentially generate numbers to dial.[24] Because some do and others do not qualify as ATDS, the mere use of a predictive dialer should not render a plaintiff's conclusory allegation that the defendant used ATDS either *more* or *less* plausible.

Some District Courts Granting Motions to Dismiss. Now, a growing number of courts have recognized the high bar to which plaintiffs must adhere to sufficiently allege the use of an ATDS in light of *Duguid*. Beginning in July 2021, district courts began to dismiss cases on the pleadings when either the plaintiff pled facts that suggested his or her number was not generated randomly or sequentially, or absent from the complaint were any allegations suggesting that the plaintiff's telephone number was generated randomly or sequentially.

For example, in *Hufnus v. DoNotPay, Inc.*, the court dismissed the complaint because, according to the plaintiff's allegations, the DoNotPay's "platform only contacts phone numbers specifically provided by consumers during DoNotPay's registration process, and not phone numbers identified in a random or sequential fashion."[25] And a growing number of courts similarly recognize that a preexisting relationship between the plaintiff and the defendant forecloses a claim under the TCPA. For instance, the court in *Camunas v. Nat'l Republican Senatorial Comm.* dismissed the case at the pleadings stage where plaintiff alleged that recipients received a text that stated "you're listed as a Trump supporter." The court concluded that defendant targeted the plaintiff with its text message, as opposed to generating his number from a random or sequential number generator.[26]

A court in the Southern District of California also came to the same conclusion. In *Wilson v. Rater8, LLC*, the court ruled that the receipt of a text message from a physician minutes after seeing the physician "counsel against finding Plaintiff's ATDS claims to be plausible."[27] In so ruling, the court recognized the improbability that the physician's random or sequential number generator "happened to randomly generate his cellular phone number and send a text about that examination" only "minutes after undergoing his examination."[28] Beyond the statistical unlikelihood, such a contention, of course, assumes that the physician even possessed a random or sequential number generator, an assumption that neither party appeared to challenge. As another federal court explained: "When a defendant randomly makes calls from a curated list, it is not randomly or sequentially *generating* phone numbers."[29]

At least one court initially reluctant to dismiss ATDS-based TCPA claims on the pleadings reversed course in light of the growing body of case law making such points. In July 2021, the district court in *Gross v. GG Homes, Inc.* refused to dismiss the plaintiff's complaint because it found that the plaintiff's sole allegation that the defendant sent telephone calls with technology that has "the capacity to store numbers and dial them automatically" was sufficient to plead the use of an ATDS in violation of the TCPA. Three months later, however, the defendant came forward with "additional authority to support its argument that the FAC falls short of adequately alleging the use of an ATDS under *Duguid*."[30] In response, the court reconsidered and dismissed the complaint because the plaintiff alleged that the text messages addressed the plaintiff by name. Thus, the court concluded that a claim alleging the use of an ATDS, which by definition under *Duguid,* does not include targeted messages, was not sufficiently pled to assert a viable TCPA claim.[31]

In short, following *Duguid* there is a growing momentum of case law supporting the dismissal of complaints on the pleadings when the plaintiff fails to sufficiently plead the use of ATDS. Various federal courts have recognized that allegations demonstrating a preexisting relationship, from which the defendant sends targeted communications, counsels against the inference that the defendant used ATDS.[32]

The Footnote 7 Argument

The plaintiffs' bar, when confronted by the *Duguid* decision, often has attempted to focus on footnote 7 of the decision to argue that the definition of ATDS applies broadly to technology that merely chooses, on a randomized or sequential basis, which numbers to call from a stored list of customer numbers. In pertinent part, footnote 7 states:

> [A]n 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.[33]

Plaintiffs faced with *Duguid* relied on this footnote to argue that more discovery into dialing systems is required so they can then argue that equipment that pulls numbers from a larger database is an ATDS. The *Hufnus* court was one of the first courts to criticize this approach, opining that this "Footnote 7" argument "relies on an acontextual reading of the line, both with respect to the footnote specifically and the opinion more generally."[34] Specifically, the court noted that *Duguid* used Footnote 7 to explain how an autodialer might both "store" and "produce" randomly or sequentially generated phone numbers—not to undercut its overall holding that Facebook's targeted text messages to a customer's phone number would not have been placed with an ATDS. This rationale is consistent with the underlying purpose of the TCPA, which was intended to address the unique problem of sequential or random number generators tying up all the lines at a single entity.

At least twelve federal district courts have considered and ultimately rejected this argument, finding that *Duguid* recognizes that TCPA liability under § 227(a)(1) can apply *only* when callers generated telephone numbers randomly or sequentially and dialed those numbers. "The definition of an autodialer does not concern systems that randomly or sequentially store and dial numbers from a list that is generated in a non-random and non-sequential way."[35] In other words, "an autodialer must randomly or sequentially generate the digits of a phone number, not merely determine the order by which phone numbers are picked from a list."[36]

As a result, "[a] 'clear majority of courts' discount" and reject this so-called Footnote 7 interpretation of *Duguid*.[37] As a Northern District of California court added: "most courts to consider the position [the plaintiff] advances have rejected an interpretation of the TCPA and *Duguid* that would encompass the use of random number generators to determine the dialing order of telephone numbers that were not themselves produced randomly or sequentially."[38]

However, some district courts have permitted ATDS-based claims to proceed past a motion to dismiss because of Footnote 7 arguments, with an Arizona federal court holding "a footnote of the [*Duguid*] opinion recognized that a device may still constitute an autodialer under the TCPA if it randomly dials numbers from a preproduced list."[39] Similarly, a federal court in Maine largely adopted the Footnote 7 argument, commenting that "a device that calls phone numbers from a 'preproduced list' may still be an ATDS, so long as it 'uses a random [or sequential] number generator to determine the order in which to pick' the numbers from the list."[40]

The first two circuit courts to wade into the post-*Duguid* ATDS debate each has addressed Footnote 7 arguments and has sided with the clear majority of district courts rejecting that reading of *Duigud*'s reasoning. In its recent unpublished opinion, the Ninth Circuit firmly rejected the so-called Footnote 7 argument. On January 19, 2022, the Ninth Circuit in *Meier v. Allied Interstate LLC* affirmed summary judgment because the defendant's technology required that it "upload lists of telephone numbers."[41] While the plaintiff had pointed to Footnote 7 and argued that a system that randomly or sequentially determines the order in which to call a pre-produced list of telephone numbers could qualify, the Ninth Circuit held that "this is precisely the outcome the Supreme Court rejected in *Duguid*."[42]

Similarly, the Eighth Circuit in *Beal v. Outfield Brew House, LLC* held that ATDS means, and is limited to, technology that actually generates telephone numbers either randomly or sequentially.[43] The *Beal* court held that technology that merely selects which pre-produced number to call or text at a given time cannot constitute a ATDS when the numbers themselves were not randomly or sequentially provided, but were instead customer-provided numbers. The *Beal* court ruled that, because "a 'random or sequential number generator' does the producing," and "a generator produces by generating," the context of the statute forecloses the plaintiff's argument.[44] In short, "because [the defendant's technology] does not generate phone numbers to be called," but merely selects which phone to call from a pre-produced list, "it does not 'produce telephone numbers to be called' for purposes of § 227(a)(1) of the TCPA."[45] The court explicitly rejected the Footnote 7 argument after finding that it referenced "[a] hypothetical system . . . in which numbers were sequentially generated before being stored and later randomly selected."[46]

With two circuit having rejected the Footnote 7 argument, Plaintiffs advancing arguments based on *Duguid's* Footnote 7 will likely face a steeper uphill battle to convince any court of the viability of such an interpretation. And the difficulty is likely only to grow, as more and more district courts rely on *Beal* and *Meier* to reject the Footnote 7 argument.

Summary Judgment Rulings Applying *Duguid*

Summary judgment has proved a successful battleground for defendants to defeat TCPA cases based on *Duguid*. Where courts have considered motions for summary judgment after *Duguid*, all cases but one were dismissed on summary judgment based on failed ATDS allegations (and even in the one remaining case, the defendant was granted summary judgment for having proved prior consent). As

detailed below, courts have concluded that *Duguid* requires plaintiffs to prove that defendants generated the plaintiffs' phone numbers randomly or sequentially and, without such evidence, granted summary judgment to the defendants that each were placing targeted calls or texts.

In *LaGuardia v. Designer Brand, Inc.*, when faced with unrebutted evidence that the defendant's technology did not generate telephone numbers randomly or sequentially, the plaintiffs attempted to escape summary dismissal by arguing that the defendant's technology qualified as ATDS because it "issues a sequential identification ('ID number') for every message it sends."[47] In dismissing the plaintiffs' case, the court specifically recognized that "Plaintiffs' focus was off. The ATDS definition addresses the ability to randomly or sequentially store or generate phone numbers, not message identification numbers."[48]

Similarly, a district court in Northern District of California also rejected the plaintiff's argument that equipment that sequentially generates index numbers could qualify as ATDS, and thus granted the defendant's motion for summary judgment.[49] Then, only one day later, the same Northern District of California court granted another defendant's motion for summary judgment.[50]

Courts have refused to broaden the definition of ATDS to include equipment that only generates the order in which to call a list of telephone numbers randomly or sequentially. In *Timms v. USAA Fed. Sav. Bank*, the court recognized that the pre-produced list to which the *Duguid* opinion referred in Footnote 7 was itself randomly or sequentially generated.[51] As a result, the court granted the defendant's motion for summary judgment because ATDS requires that the equipment randomly or sequentially generate telephone numbers, not the mere index numbers, and because the defendant's "systems are capable of making telephone calls only to specific telephone numbers from dialing lists created and loaded by" the defendant.[52]

In *Barnett v. Bank of America, N.A.*, the court granted summary judgment because the only evidence the plaintiff had to demonstrate ATDS was the deposition testimony of the defendant's employees stating that "the [telephone] numbers are selected for calls based on several factors."[53] The court, however, correctly recognized that "this very testimony undermines Plaintiff's argument" because the testimony indicates that the telephone numbers were chosen from pre-produced lists, but *Duguid* requires that "the equipment in question" randomly or sequentially generate the telephone numbers.

Although most courts have dismissed TCPA cases on summary judgment after *Duguid*, one court refused to grant summary judgment because of a lack of use of ATDS. In *Carl v. First National Bank of Omaha*, the court appeared to favor the plaintiff's Footnote 7 argument.[54] However, the *Carl* holding was issued only two months after the *Dugiud* holding, when the *Carl* court had to grapple with this argument without the benefit of the other numerous district courts' holdings squarely rejecting the so-called Footnote 7 argument. This may be an aberrational decision after the Ninth Circuit's subsequent rejection of the Footnote 7 argument.

Finally, in an important recent decision at the summary judgment stage, the Third Circuit held that under *Duguid* the actual *use* of a dialing system is what matters when examining ATDS-based liability. The Third Circuit held that a system's capability is not the determining factor of whether it is an ATDS, "to use an ATDS as an autodialer, one must use its defining feature—its ability to produce or store numbers through random,or sequential-number generation."[55] While this latest circuit court ruling is strong for defendants that are placing calls or texts only to customers' targeted numbers, such a determination made at a summary judgment stage after rounds of discovery does not necessarily assist defendants in dealing expeditiously with ATDS claims at the outset of litigation.

But while summary judgment decisions on the ATDS front have favored defendants that were not using random or sequential number generators to generate telephone numbers to call, the discovery taken on the road to summary judgment can be expensive, especially in class action litigations.

Conclusion

The Supreme Court's holding in *Duguid* is relatively straightforward. Just as the text of the statute states, a defendant is liable under section 47 U.S.C. § 227(b)(1)(A) only if the defendant generated the plaintiff's telephone number via a random or sequential number generator. Anything less falls outside the purview of § 227(b)(1)(A).

As discussed above, more and more courts appear poised to dismiss ATDS-based complaints when the communications at issue are targeted calls or texts. However, until there is a true consensus among the critical mass of cases applying *Duguid* or until a sufficient number of circuit courts of appeal have had the opportunity to weigh in on the matter, companies placing targeted calls or texts to their customer base could still find themselves embroiled in ATDS-based TCPA litigation that will be progressing through discovery.

Courts considering summary judgment motions have recognized that after *Duguid,* a plaintiff must have evidence demonstrating that his or her number was randomly/sequentially generated to succeed with an ATDS-based TCPA claim. But for such a decision to wait until summary judgment means that the parties (and the court) have been forced to wade through the time and expense of discovery and summary judgment briefing before finally assessing the ATDS question that, to the *Duguid* Court, was clear in the context of a motion to dismiss.

It does appear that certainty is slowly setting in, and should be aided by the Ninth and Eighth Circuits' recent rejection of Footnote 7 arguments: when calls or texts at issue were placed by companies attempting to contact their own customers' phone numbers, ATDS-based claims should not be found viable after *Duguid*. ■

[1] 47 U.S.C. § 227(b)(1)(A).

[2] 141 S. Ct. 1163, 1167 (2021).

[3] The *Duguid* decision did not impact other TCPA-based claims regarding the use of pre-recorded calls or marketing to numbers on the federal do not call list. TCPA claims brought under such theories of liability continue to be brought—and are now brought on a more frequent basis given the impact of *Duguid* on ATDS-based claims.

[4] H. R. Rep. No. 102–317, p. 24 (1991).

[5] *Duguid*, 141 S. Ct. at 1167.

[6] 47 U.S.C. § 227(b)(1)(A).

[7] 47 U.S.C. § 227(a)(1) (emphasis added).

[8] *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 15391, 15399 (2012).

[9] Hunt v. 21st Mortg. Corp., No. 2:12-CV-2697-WMA, 2013 WL 5230061, at *3 (N.D. Ala. Sept. 17, 2013) (quoting *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1010 (N.D. Ill. 2010)).

[10] King v. Time Warner Cable, 113 F. Supp. 3d 718, 725 (S.D.N.Y. 2015), vacated and remanded sub nom. King v. Time Warner Cable Inc., 894 F.3d 473 (2d Cir. 2018) ("Whether it *actually* dialed King's number randomly or from a list is irrelevant.").

[11] *See, e.g.,* Meyer v. Portfolio Recovery Assocs., LLC, 707 F.3d 1036, 1043 (9th Cir. 2012) (quoting Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 951 (9th Cir. 2009)) (internal citations omitted).

[12] Duguid v. Facebook, Inc., 926 F.3d 1146, 1150 (9th Cir. 2019), rev'd and remanded, 141 S. Ct. 1163 (2021).

[13] Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1052 (9th Cir. 2018) ("[T]he statutory definition of ATDS is not limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' but also includes devices with the capacity to dial stored numbers automatically.").

[14] *Duguid* 926 F.3d at 1152.

[15] *Duguid*, 141 S. Ct. at 1167 (quoting 47 U.S.C. § 227(1)(A)).

[16] *Id.* at 1167 (internal quotations omitted).

[17] *Id*.

[18] Meier v. Allied Interstate LLC, No. 20-55286, 2022 WL 171933, at *1 (9th Cir. Jan. 19, 2022); *see also Beal v. Outfield Brew House, LLC*, 29 F.4th 391 (8th Cir. 2022).

[19] 536 F. Supp. 3d 828, at 837 (D. Colo. 2021).

[20] No. SA-21-CV-178-OLG, 2021 WL 2669558, at *1 (W.D. Tex. June 16, 2021).

[21] No. EP-20-CV-00304-KC, 2021 WL 2688622, at *5 (W.D. Tex. May 10, 2021).

[22] No. CV-20-00482-TUC-JGZ, 2021 WL 3270318, at *4 (D. Ariz. July 30, 2021).

[23] No. CV 21-368-MWF (MAAX), 2021 WL 6618544, at *3 (C.D. Cal. Dec. 9, 2021)

[24] Garner v. Allstate Ins. Co., No. 20 C 4693, 2021 WL 3857786, at *4 (N.D. Ill. Aug. 30, 2021).

[25] No. 20-CV-08701-VC, 2021 WL 2585488, at *1 (N.D. Cal. June 24, 2021).

[26] No. CV 21-1005, 2021 WL 5143321, at *4 (E.D. Pa. Nov. 4, 2021).

[27] No. 20-CV-1515-DMS-LL, 2021 WL 4865930, at *3 (S.D. Cal. Oct. 18, 2021).

[28] *Id.*

[29] Franco v. Alorica Inc, No. 22-CV-05035-DOCKESX, 2021 WL 3812872, at *3 (C.D. Cal. July 27, 2021).

[30] Gross v. GG Homes, Inc., No. 321-CV-00271-DMSBGS, 2021 WL 4804464, at *3 (S.D. Cal. Oct. 14, 2021).

[31] *Id.*

[32] *See* Jovanic v. SRP Investments LLC, No. CV-21-00393-PHX-JJT, 2021 WL 4198163, at *4 (D. Ariz. Sept. 15, 2021); Watts v. Emergency Twenty Four, Inc., No. 20-cv-1820, 2021 WL 2529613, at *3 (N.D. Ill. June 21, 2021); Barry v. Ally Fin., Inc., No. 20-12378, 2021 WL 2936636, at *3-4 (E.D. Mich. July 13, 2021); Stewart v. Network Cap. Funding Corp., 549 F. Supp. 3d 1058, 1060 (C.D. Cal. 2021); *Franco*, 2021 WL 3812872, at *3.

[33] *Duguid*, 141 S. Ct. at 1172 n.7.

[34] *Hufnus*, 2021 WL 2585488, at *1.

[35] *In re* Portfolio Recovery Assocs., LLC, Tel. Consumer Prot. Act Litig., No. 11MD02295 JAH - BGS, 2021 WL 5203299, at *4 (S.D. Cal. Nov. 9, 2021).

[36] DeClements v. Americana Holdings LLC, No. CV-20-00166-PHX-DLR, 2021 WL 5138279, at *2 (D. Ariz. Nov. 4, 2021).

[37] LaGuardia v. Designer Brands Inc., No. 2:20-CV-2311, 2021 WL 4125471, at *8 (S.D. Ohio Sept. 9, 2021) (quoting *Tehrani v. Joie De Vivre Hosp., LLC*, No. 19-cv-08168-EMC, 2021 WL 3886043, at *7 (N.D. Cal. Aug. 31, 2021)).

[38] Cole v. Sierra Pac. Mortg. Co., Inc., No. 18-CV-01692-JCS, 2021 WL 5919845, at *3 (N.D. Cal. Dec. 15, 2021) [currently being appealed, Case No. 22-15078].

[39] MacDonald v. Brian Gubernick PLLC, No. CV-20-00138-PHX-SMB, 2021 WL 5203107, at *2 (D. Ariz. Nov. 9, 2021).

[40] *Mc*Ewan v. National Rifle Association, No. 2:20-CV-00153-LEW, 2021 WL 5999274, at *4 (D. Me. Dec. 20, 2021) (quoting *Duguid*, 141 S. Ct. at 1172 n.7).

[41] 2022 WL 171933, at *1 (9th Cir. Jan. 19, 2022).

[42] *Id.*

[43] 29 F.4th at 394.

[44] *Id.*

[45] *Id.* (quoting 47 U.S.C. § 227(a)(1)).

[46] *Id.* at 396.

[47] No. 2:20-CV-2311, 2021 WL 4125471, at *7 (S.D. Ohio Sept. 9, 2021).

[48] *Id.* at *7

[49] Pascal v. Concentra, Inc., No. 19-CV-02559-JCS, 2021 WL 5906055, at *8 (N.D. Cal. Dec. 14, 2021) [Appeal filed, Case No. 22-15033].

[50] *Cole*, 2021 WL 5919845, at *3 (determining that "under the TCPA, an ATDS must be capable of randomly or sequentially generating telephone numbers").

[51] 543 F. Supp. 3d 294, 301-302 (D.S.C. 2021).

[52] *Id*.

[53] No. 3:20-CV-272-RJC-DSC, 2021 WL 2187950, at *3 (W.D.N.C. May 28, 2021).

[54] No. 2:19-CV-00504-GZS, 2021 WL 2444162, at *8 (D. Me. June 15, 2021).

[55] Panzarella v. Navient Sols., Inc., 37 F.4th 867, 879–80 (3d Cir. 2022).