

Consumer Finance Monitor (Season 5, Episode 12): An Update on Telephone Consumer Protection Act Litigation in the Aftermath of the U.S. Supreme Court's Decision in Facebook v. Duguid

Speakers: Dan McKenna and Matt Morr

Dan McKenna:

Welcome to the Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. I'm your host, Dan McKenna, Co-Chair of Ballard Spahr's, Consumer Financial Services Group.

Dan McKenna:

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Dan McKenna:

Today, I'm joined by Matt Morr. Matt's a partner in our Denver office, and we are going to be discussing TCPA litigation after the Facebook decision.

Dan McKenna:

So approximately a year ago, in fact almost to the day, the Supreme Court ruled in the Duguid Facebook decision, and in so doing the Supreme Court provided a narrower definition for what constitutes an automatic telephone dialing system. To qualify as an automatic telephone dialing system, or an ATDS, a device has to have the capacity to either store a telephone number using a random or sequential number generator or produce a telephone number using a random or sequential number generator. And to quote the Supreme Court, "In sum, Congress' definition of an auto dialer 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. This definition excludes equipment like Facebook's login notification system, which does not use such technology."

Dan McKenna:

That was a fantastic decision in the TCPA world, but it didn't end the litigation. We are now a year out from the Facebook decision, and I'd like to turn it over to Matt Morr and ask you, Matt, what trends have we seen in the industry since?

Matt Morr:

Thanks, Dan. Well, in the immediate aftermath, we saw a lot of positive developments. We saw plaintiffs' attorneys dismissing cases. We saw some quick and cheap settlements. In the past year, we've had some very good decisions, holding that various types of dialing and notification systems are not ATDSs.

Matt Morr:

But this is not to say that the plaintiffs' bar has given up. To try and get around the holding, the plaintiffs' bar has attempted to really latch on to some language in a footnote in the Facebook case to argue for a broad interpretation of what constitutes an

ATDS. The plaintiffs' bar has also really switched their focus to other parts of the TCPA. Namely, they are filing suits based on the TCPA's prohibition of the use of artificial or recorded voice and to Do Not Call violations.

Dan McKenna:

So, Matt, I want to stop you there if I can. I don't know that everyone appreciates the distinction between ATDS and artificial or pre-recorded voice. So just so I'm clear, they are separate and independent violations of the statute, correct?

Matt Morr:

Yes, that's exactly right. And prior to the Facebook decision, most of the cases I saw were really about whether a call was used using an ATDS to call someone without consent. But the next part of the statute also prohibits calls using artificial or recorded voice without consent.

Dan McKenna:

And so that means then that the Facebook decision, which is specific to ATDS, ultimately has no impact on the prohibitions against artificial or pre-recorded voices, correct?

Matt Morr:

That's exactly right. And so calls that people receive from essentially an electronic voice can still be a violation of the TCPA.

Dan McKenna:

And that means that the proliferation of vendors that we see in the market today who are offering voicemail services and pre-recorded voice services to our clients, those all are subject to TCPA prohibitions. Correct?

Matt Morr:

That's right. And whether there's a TCPA violation for those types of calls does not turn on whether they're using an ATDS. It really just turns on whether the calls use an artificial or a recorded voice.

Dan McKenna:

And, of course, the consent piece.

Matt Morr:

Yes.

Dan McKenna:

Okay. So then let's turn back to the ATDS issue that was addressed in Facebook. You mentioned the footnote. I know that you're referring to footnote seven. Can you tell us first what that footnote is all about and what arguments have been made about that footnote in the ATDS cases?

Matt Morr:

Yes. The main piece of that footnote is a section where the Supreme Court says "an auto dialer might use a random number generator to determine the order in which to pick phone numbers from a pre-produced list." And what that has caused is plaintiffs' lawyers to say if you input a list and then the dialing system chooses the order to call those numbers at random, then that telephone system could be an auto dialer or an ATDS.

Dan McKenna:

Has that really gotten any traction though, Matt?

Matt Morr:

There's been a lot of decisions about it and a lot of arguments, but fortunately the district courts and in one unpublished Ninth Circuit decision, they're really rejecting this interpretation.

Matt Morr:

One of the things that the district courts have been doing is going back and looking at what the Supreme Court was referring to in the footnote. And as it turns out, the Supreme Court was relying on an amicus brief. And the amicus brief was referring to a system that both randomly generated numbers to begin with and then randomly dialed those numbers. That is a very important distinction because what the district courts are finding is that the dialing system does not generate the numbers on its own from scratch. That is not an ATDS. So we've had numerous courts hold that if the numbers are being inputted from a list and then being randomly or sequentially ordered, then that is not an ATDS.

Matt Morr:

For example, in the Camunas case, in the Eastern District of Pennsylvania, it granted a motion to dismiss on a TCPA claim because the number that was called was inputted into a list into the dialing system. And because it was inputted as a list, then the system was not an ATDS. We've seen similar cases in the Southern District of California, the District of Arizona, and the District of New Jersey, where they've said that allegations that phone numbers dialed from a stored list do not meet the definition of an ATDS.

Matt Morr:

In that case, the Ninth Circuit held that a live box system was not an ATDS just because it stored pre-produced lists of telephone numbers. While the Ninth Circuit decision did not address whether a system that randomly or sequentially reorders the order in which numbers are called, all the district courts that we've seen that have looked at this have held that an ATDS needs to generate numbers themselves and not just determine the order to call them. So the thrust of the decisions is if you are inputting the number into the phone system from a list and the system is dialing those numbers, then the system is not an ATDS.

Dan McKenna:

So Matt, unlike old ATDS cases where we used to see a lot of differing views from the courts on whether or not somebody had adequately alleged the use of an ATDS, it looks like more and more courts are dismissing these cases at the pleading stage. Is that right?

Matt Morr:

It is. And some of the courts are really looking at the Twombly standard and saying has the plaintiff plausibly alleged that the dialing system is an ATDS? And so it's requiring a pleading standard where the plaintiff really describes what the phone system is doing. And district courts are looking at those allegations and saying no, this does not qualify.

Dan McKenna:

So you'll remember that it used to be pretty hard to get TCPA cases dismissed on the ATDS basis because people could adequately allege a claim and the district courts and the circuit courts were differed so much on what the applicable standard was. As a result, you were forced to engage in some costly litigation or try to resolve or compel arbitration. It seems to me now, a very viable option is to move to dismiss if you see an ATDS claim. Do you agree?

Matt Morr:

I do agree. But certainly, it will depend on what it says in the allegations. But if the allegations are generic or relate to a certain type of phone system that has already been found not to be an ATDS, I think it's a very good strategy to move to dismiss.

Matt Morr:

Another option, depending on your jurisdiction, is if you have a proposed scheduling order and a scheduling conference with the judge, is to really describe what the phone system is and why it's not an ATDS in that proposed scheduling order and try and get the court to look at that issue early.

Dan McKenna:

That makes a lot of sense. Thank you. I want to transition back to where the risk remains then, if you don't mind, and focus a little bit more on the artificial or pre-recorded voice. You mentioned that those cases are, and as we discussed, they're outside of the Facebook decision. What are we seeing in the filing of those cases?

Matt Morr:

Well, we're both seeing filings of new cases alleging the use of artificial or pre-recorded voice. We've also seen situations where cases that were essentially dormant pending the Facebook decision have switched theories midstream to focus more on the artificial or pre-recorded voice. Like the ATDS cases, the plaintiffs' bar is attempting to file these cases as class actions.

Dan McKenna:

So Matt, are you seeing now a higher percentage of cases being filed as class actions than we used to when the claims were grounded on ATDS?

Matt Morr:

Definitely. The plaintiffs' bar is focusing heavily on the pre-recorded voice cases as class actions. And the reason they're doing so is that the penalties are significant and the volume of calls can be extremely high.

Dan McKenna:

I know that particularly in the ATDS space where we saw so much volume and that volume was often in collections-related litigation, so much of the focus was on cell phones. There was tons of litigation about subscribers and customary users and phone ownership and standing and all sorts of other issues. You never really saw or had any need to see the landline pop up in the ATDS cases. Is the landline a factor on the prohibition on artificial and pre-recorded voices?

Matt Morr:

Yes, it is. Unlike an ATDS call, the TCPA prohibits making calls to residential telephone lines using an artificial or pre-recorded voice unless the party has given prior consent. When we were dealing with the ATDS cases, a big question was always whether the call was made to a cell phone, who is the subscriber to a cell phone. When we're talking about artificial or pre-recorded voices, that is not as important because it includes residential landlines.

Dan McKenna:

What about text messages? Does it apply to text messages?

Matt Morr:

So in the Eggleston case, in the Central District of California, Judge Stephen Wilson recently looked at this question. There, the plaintiff alleged she was receiving spam text messages advertising a rewards program. And the plaintiff brought a case to say that these text messages were an artificial or pre-recorded voice. And Judge Wilson looked at it carefully and said, "Look,

the TCPA does not define artificial or pre-recorded voice, but let's look at what the dictionary definition of the word voice is." And what he said is the definition of voice includes sound. And so he went on to reject a broader definition of voice to apply to text messages and said, "Look, if Congress wanted this part of the TCPA to apply to text messages, then Congress could have used a different word instead of voice. It could have said something far broader like communication."

Dan McKenna:

That makes sense. I've also seen some argument and case law around the issue that the FCC defines texts to be a call and thus applicable to the ATDS space, but not so much to the pre-recorded voice space, which I think makes a lot of sense.

Dan McKenna:

Let's spend a few minutes, if you don't mind, transitioning away from the pre-recorded voice and the ATDS issues and talk about the Do Not Call violations. I think you mentioned that at the beginning, and I'd like to ask what's happening there?

Matt Morr:

So by way of background, the FCC's implementing regulations of the TCPA prohibit the initiation of any telephone solicitation to consumers who have registered their phone numbers on that Do Not Call Registry. And like other parts of the TCPA, there's a private right of action that consumers can bring if they've received more than one call.

Matt Morr:

So if someone has registered with the Do Not Call Registry and they receive a call, a big part of the dispute will be is this call a telephone solicitation. Telephone solicitation is defined as telephone call or message for the purpose of encouraging the purchase or rental of or investment in property, goods, or services which is transmitted to any person. The definition of telephone solicitation does have some exceptions. It does not include a person that's given their prior express consent. It doesn't include a person with whom the caller has an established business relationship. And it also doesn't include tax-exempt nonprofit organizations.

Dan McKenna:

So I know for a fact that there's a lot of gray area in that space. I mean, you're talking about EBR or existing business relationships. You're talking about the purpose of the call, whether it's true purpose or secondary purpose and dual purpose calls. Are you aware of any case law that talks about that gray area?

Matt Morr:

There are. And just like you said, it is gray. So we have some cases, for example, that have looked at customer rewards programs. And they've said if you're calling someone about a customer reward program, that is a telephone solicitation. But we have other cases looking at very similar facts that say, look, if you're asking someone to be in a rewards program, that's not the same as a solicitation. That's something different.

Dan McKenna:

I know that there's a bunch of case law on EBR as well, and obviously happy to help folks if they tackle those issues. Both from a compliance and litigation perspective then, Matt, I mean, it looks like our clients need to continue to be concerned about the TCPA. I know that we see more and more clients who are engaging with their customers in different ways, and of course are remaining to be TCPA compliant and intend to be TCPA compliant, but it doesn't stop the litigation from coming. So can you give us a sense as we roll out here what the biggest TCPA risks are?

Matt Morr:

I think the first big risk is reassigned numbers. Nearly 100,000 numbers are reassigned every day. Since consent is associated with the call party and not the phone number, the possibility of contacting a reassigned number brings an enormous amount of TCPA risk.

Matt Morr:

So the easy example is you have a borrower that you've been working with. You have their cell phone number and you have consent to call them or their residential landline number and you've been calling them with an artificial voice. They change cell phone number plans and they have a new number and you call the number that you previously had permission to call and you put yourself at risk for a TCPA violation.

Matt Morr:

The next big risk is the Do Not Call violations. In addition to the national Do Not Call list, there's also state regulations in this area. And so as you're making sure that your policies and procedures are compliant, you need to look at federal and state Do Not Call laws.

Matt Morr:

A third area that's concerning is the area of data. Companies and marketers are often acquiring lead lists from outside lead generators or having lead generators make the initial contact and then transfer them over to the company. You need to make sure that your lead generator is being compliant or you run the risk of a plaintiff suing you upstream based on traditional agency theories.

Dan McKenna:

So Matt, that's a lot of risk that you just mentioned. It seems like the TCPA remains very dangerous based on the conversation we had today. I understand that the ATDS cases are fewer and fewer, but we are seeing a significantly higher volume of pre-recorded message cases and DNC cases. And I understand that particularly the pre-recorded cases are being brought primarily, or at least at a higher percentage as class actions. Given the fact that TCPA's strict liability and the penalties are so high, it sounds like our clients still need to really be focused on the TCPA and can't think, and it would be a mistake to think that Facebook was a panacea. Do you agree?

Matt Morr:

I do agree. I think it's just as important now as ever for companies to make sure that they have policies and procedures in place, to make sure that their systems are compliant, to make sure that they're getting consent from the people they're calling, and that if they're using a third party, like a lead generator to make calls, to make sure that they have indemnity and other rights to make sure that those third parties are being compliant.

Dan McKenna:

Well, and it sounds like they also need to stay on top of the law by continuing to engage with all of the tools that we have available, including this podcast and our webinar series, so that they can stay on top of the changes in the TCPA and the different risks that are there. So thank you, Matt, for educating us and for giving our clients the opportunity to hear about the goings on in the TCPA space.

Dan McKenna:

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