

TCPA Litigation Update — Taking Stock of Facebook at the Pleadings Stage

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The U.S. District Court for the District of Colorado appears to have beat the rest of the judiciary to the post-*Facebook* pleading stage punch in the form of a recommendation to allow an ATDS claim past the pleadings in *Montanez v. Future Vision Brank Bank, LLC*.^[1] The plaintiff alleged receiving “numerous telemarketing text messages” she claims were sent with “a combination of hardware and software systems” that had “the capacity to store telephone numbers using a random or sequential generator, and to dial such numbers from a list without human intervention.”^[2] None of the messages “were addressed specifically” to the plaintiff.^[3] Though the defendant shot back, arguing the plaintiff’s allegations were conclusory, the claim survived (for now).

Recognizing the shift in the post-*Facebook*^[4] TCPA landscape, the court noted: “it is critical that a random or sequential number generator be utilized to constitute an ATDS.”^[5] The court previewed *Facebook*’s import at summary judgment but concluded that at the pleading stage, the allegations in this particular case sufficed.^[6] Given that this was a U.S. magistrate judge’s recommendation, we anticipate the defendant will submit written objections for reconsideration.

Though *Montanez* has recommended that this claim survive the pleading stage, defendants challenging ATDS allegations are wise to keep *Facebook*’s procedural posture in mind as an arrow in the quiver. Defendants should not lose touch with the fact that Facebook initially won a motion to dismiss and ultimately teed the issue up to the Supreme Court — as the Supreme Court noted, “Facebook moved to dismiss . . ., arguing primarily that Duguid failed to allege that Facebook used an autodialer because he did not claim Facebook sent text messages to numbers that were randomly or sequentially generated.”^[7] When plaintiffs argue that their claims should survive into discovery, defendants should also keep in mind the Supreme Court’s willingness to conclude that a platform was not an ATDS at the pleading stage: “Because Facebook’s notification system neither stores nor produces numbers ‘using a random or sequential number generator,’ it is not an autodialer.”^[8]

And while post-*Facebook* authority applying the standard at the pleading stage is currently sparse, defendants should also consider reliance on positive pre-*Facebook* authority from the Seventh, Eleventh, and Third Circuits (all of which narrowly interpreted the statute’s ATDS definition prior to *Facebook*). The same is true of authority from district courts outside those circuits that chose

to adopt narrow pre-*Facebook* standards.

In *DeCapua v. Metro. Prop. & Cas. Ins. Co.*, for example, the District of Rhode Island dismissed a TCPA claim premised on the use of an ATDS relying on a narrow reading of the statute. As in *Montanez*, the plaintiff's case was premised on the alleged receipt of marketing text messages.^[9] Unlike *Montanez*, however, the court concluded — at the pleading stage — that the texting platform could not randomly or sequentially generate numbers.^[10] As several plaintiffs have in the past, the plaintiff in *DeCapua* took the position that although the texting platform did not actually generate telephone numbers, it could be linked to Microsoft Excel, which had that ability. The court summarily rejected the argument.^[11]

With *Facebook*, the Supreme Court has confirmed that decisions such as *DeCapua* are not outliers. *Montanez* is not a trend, and TCPA defendants should litigate with *Facebook's* posture and conclusion in mind while keeping decisions like *DeCapua* in their pocket.

Endnotes

[1] *Montanez v. Future Vision Brain Bank, LLC*, No. 20-cv-02959, 2021 WL 1291182 (D. Col. Apr. 7, 2021).

[2] *Id.* at *1.

[3] *Id.*

[4] *Facebook, Inc. v. Duguid*, 141 S.Ct. 1163 (2021).

[5] *Id.* at *6

[6] *Id.*

[7] *Facebook*, 141 S.Ct. at 1168.

[8] *Id.* at 1169.

[9] *DeCapua v. Metro. Prop. & Cas. Ins. Co.*, No. 18-590, 2020 WL 1303248, *1 (D. R.I. Mar. 19, 2020).

[10] *Id.* at *2.

[11] *Id.* at *2.

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