Huge TCPA Win!: Court Finds Aspect predictive Dialer Not an ATDS– Explains Away Footnote 7

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Well this is a big one.

In the best analyzed *post-Facebook* ATDS decision to date, a Court in South Carolina has ruled the Aspect predictive dialer is not an ATDS because it lacks a random or sequential number generator. The decision is *Timms v. Usaa Fed. Sav. Bank,* C/A No. 3:18-cv-01495-SAL, 2021 U.S. Dist. LEXIS 108083 (D.S.C. June 9, 2021) and–if defendants are lucky–the decision will form the bedrock for predictive dialer jurisprudence moving forward.

Most critically, the Court cabins off footnote 7 and interprets it as applicable only to systems that actually use an R&SNG to select the sequence of numbers to be dialed–but not to every dialer that calls sequentially.

Also important- the Court found that the system lacked the capacity to randomly or sequentially generate numbers–crediting the declarations from the Defendant to that effect. Interestingly, the declaration did not appear to come from Aspect–meaning there was no deep review of the system's true capabilities–but the Court relied on the operation of the system *in practice* by the Defendant on the issue of capacity. That's pretty interesting.

To get there, the Court relied on the Plaintiff's own submissions in connection with the undisputed facts at issue. The Plaintiff's statement noted that the dialer called "sequentially"–but not that it used a random or sequential number generator to determine the sequence of dialing. That was Plaintiff's critical error in the court's view.

Here's the punchline:

There is no evidence that the Aspect UIP or Aspect AIC store numbers using a random or sequential number generator or produce numbers using a random or sequential number generator. Both systems "are capable of making telephone calls only to specific telephone numbers from dialing lists created and loaded by" Defendant. Deneen Decl. at ¶ 6. They "cannot store or produce telephone numbers suing a random or sequential number generator." Id. at ¶ 13.

Yeah, that's pretty good.

Again, however, caution is urged here. Keep in mind that the declaration here came from the Defendant, not the software provider. Had Plaintiff come forward with some contrary evidence regarding the *capacity* of the system to select numbers randomly or sequentially the result may have been different. And while the Court in one breath limits fn7 to "preproduced lists" that are "sequentially generated and stored," in another it recognizes the application of fn7 to dialers that use an R&SNG to determine the sequence of numbers to be dialed.

We'll obviously keep an eye on these cases as they develop.

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