

BACKSLIDING: Latest BAD TCPA ATDS Case Allows Debt Collection Text Case Past the Pleadings Stage

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Just when you think you have TCPAWorld figured out, it throws you a curve ball.

Take ATDS cases, for instance.

I was tremendously cautious following *Facebook*, but then a wave of favorable district court decisions have come out—including a Ninth Circuit ruling that absolutely [obliterated the definition](#) and essentially holds only calls to randomly created phone numbers trigger the TCPA's ATDS definition. And I started to think.. hey, maybe ATDS cases really are dead.

This was seemingly especially true in the debt collection context—where numerous courts have held that debt collectors don't use [ATDS to collect debts](#)—and in the text message context—which has arising as the [safest channel of communication](#) following *Facebook*.

And then along comes *Cupp v. First National Collection Bureau, Inc.*, No. C 22-08112 2023 WL 2311967 (N.D. Cal. Feb. 28, 2023) as if to point out... what do I know?

Cupp is a debt collection text message case brought within the Ninth Circuit's footprint—where *Borden* is binding. It should literally have been impossible for Defendant to lose a motion for judgment on the pleadings in this jurisdiction under prevailing law but... they found a way.

In *Cupp* the court held: *While [the] complaint does not allege facts detailing exactly how defendant's text messaging system functions, it does allege that plaintiff received fifteen such messages in the rough span of one month.... Because there are material issues of fact remaining — namely how defendant's dialing system functions — judgment on the pleadings is inappropriate. Defendant's motion for judgment on the TCPA claim is DENIED.*

So the Court denied the motion literally based on nothing more than an allegation of a high volume of text messages. NO other court has found such allegations sufficient to state a claim post-*Facebook*.

Now I have to note that the Judge here—who I will not name—is an extremely intelligent and forceful judge known for blazing his own path. He is not a “follow the pack” sort of judge. A maverick, if you

will. So I am not surprised to see this ruling out of this Court.

Still, a ruling that a Plaintiff can survive the pleadings stage—in the Ninth Circuit, in a debt collection case, involving text messages—is a stunning shot across the bow of TCPAWorld and suggests that ATDS cases are not quite as dead as we thought they were.

We'll keep an eye on this.

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National Law Review, Volume XIII, Number 61

Source URL: <https://natlawreview.com/article/backsliding-latest-bad-tcpa-atds-case-allows-debt-collection-text-case-past>