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Bank Shakes TCPA Row After Facebook Autodialer Ruling

By Allison Grande

Law360 (June 10, 2021, 10:37 PM EDT) -- A South Carolina federal judge has tossed a lawsuit accusing USAA Federal Savings Bank of violating the Telephone Consumer Protection Act by placing unwanted debt collection calls, finding that the dialing equipment the bank used didn't fit within the narrow autodialer definition recently laid out by the U.S. Supreme Court in a dispute involving Facebook.

In a Wednesday ruling granting USAA's motion for summary judgment, U.S. District Judge Sherri A. Lydon rejected plaintiff Margueritte Timms' argument that the bank had used an automatic telephone dialing system as defined by the TCPA to "harass" her with at least 155 debt collection calls made without her consent over the course of a 10-month period beginning in December 2016.

Instead, Judge Lydon found that the Aspect Unified IP and Aspect Agent Initiated Contact dialers used by USAA to place the offending calls didn't meet the conditions necessary to qualify as an autodialer under the Supreme Court's **April decision in Facebook v. Duguid**, which held that such equipment must use a random or sequential number generator to fall under the disputed statutory definition.

"The fact that the Aspect UIP can automatically dial numbers on a preset list based on the number of agents available is not evidence that the Aspect UIP stores or produces telephone numbers using a random or sequential number generator," Judge Lydon wrote. "This argument is nothing more than a rehash of the now-rejected Ninth Circuit conclusion that to qualify as an ATDS, a system 'need only have the capacity to 'store numbers to be called' and 'to dial such numbers automatically.'" Just as the Supreme Court rejected the conclusion in Duguid, this court must reject it here."

The ruling marks one of the first in the nation to apply the Supreme Court's Facebook ruling and to address the argument that attorneys on both sides of the bar **had predicted that** plaintiffs would seize on: that footnote 7 in the Facebook decision, which suggests that using a random number generator to determine the order in which numbers from a preproduced list are dialed could fit the statutory definition, could be used to keep these type of claims afloat.

Shortly after the Facebook case was decided, Timms filed a brief arguing that while there was "no doubt" that the high court's decision that the TCPA narrowly covers only random-fired calls and texts to cellphones opens the floodgates to companies being able to "engage in harassing unending automatically dialed telephone campaigns on a broader scale than before, it is not the panacea that [USAA] wishes it to be."

Timms asserted that the "limitations" imposed by the Facebook ruling don't "change the fact the software used by defendant has the capacity to produce and/or store numbers by way of a random or sequential number generator, which falls directly under the definition of ATDS in the 'post-Duguid' world" and clearly precludes summary judgment in favor of USAA.

But Judge Lydon found that, even though internal USAA documents referred to the Aspect UIP as an autodialer and showed that the equipment dials numbers automatically without the assistance of an agent, these revelations weren't enough to meet the statutory definition laid out by the Supreme Court.

"As we learned from Duguid, the automatic dialing capability alone is not enough to qualify a system as an ATDS," the judge ruled. "The system at issue must store numbers using a random or sequential number generator or produce numbers using a random or sequential number generator to qualify as an ATDS."

The dialing systems used by USAA fail to meet this standard, since the company's internal documents clearly demonstrate that the equipment dials telephone numbers of members from a pre-created list of targeted accounts, according to Judge Lydon.

The judge also refused to entertain Timms' argument that footnote 7 in the high court's unanimous opinion, which was written by Justice Sonia Sotomayor, leaves open the possibility that even though USAA's dialing equipment used a stored list of numbers that weren't randomly generated, it could still qualify as an autodialer if it, as the footnote put it, "used a random number generator to determine the order in which to pick phone numbers from a preproduced list."

But Judge Lydon found that Timms' reliance on footnote 7 was "misplaced," since the plaintiff had failed to offer any evidence that the Aspect UIP randomly selected the dialing order of the telephone numbers from the predetermined list.

The judge also found that the plaintiff was taking the footnote "out of context," given that it appeared in a section of the opinion that discusses how a random number generator could be used to "store" numbers to be dialed and walked through how a piece of dialing equipment from 1988 accomplished this task.

That equipment stored numbers from a preproduced list of numbers that was sequentially generated, Judge Lydon noted. Because the pre-existing list of customer numbers in the USAA dispute wasn't sequentially generated, "the language from footnote 7 is inapposite" and can't be relied on by Timms to support her contention that the disputed dialing equipment qualifies as an autodialer, the judge concluded.

The parties' dispute dates back to June 2018, when Timms sued to recover damages from USAA for alleged violations of the TCPA, Fair Credit Reporting Act, invasion of privacy, and negligent, reckless, and/or wanton training and supervision related to the two statutory claims.

Her claims related to two credit card accounts, including one that was opened in 2011 by her husband, who died in 2016. Both accounts were reported as being delinquent in 2017, leading to Timms sending a round of dispute letters to the three major credit reporting

bureaus and USAA repeatedly calling Timms to collect payment.

In response to cross-motions for summary judgment, Judge Lydon last August ruled in USAA's favor on the FCRA and invasion of privacy claims, axing them from the dispute. The judge also denied without prejudice both parties' motions on the TCPA and related training and supervision claim, directing them to refile after the Supreme Court issued its decision in the Facebook dispute.

Counsel for the parties didn't respond to a request for comment Thursday.

Timms is represented by Penny Hays Cauley and William K. Geddings of Hays Cauley PC.

USAA is represented by James M. Dedman of Gullivan White & Boyd PA and David M. Krueger and Nora K. Cook of Benesch Friedlander Coplan & Aronoff LLP.

The case is Timms v. USAA Federal Savings Bank, case number 3:18-cv-01495, in the U.S. District Court for the District of South Carolina.

--Editing by Emily Kokoll.

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