

## Ninth Circuit Rejects FN7!: Holds LiveVox HCI Is Not an ATDS in Unpublished Decision

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Well here's huge news.

In a short opinion out yesterday—that is, unfortunately, non-binding authority because it was not published—the Ninth Circuit Court of Appeals has held that *Facebook's* FN7 was merely dicta and that dialers that call in the order in which numbers are received are not thereby rendered autodialers under the TCPA.

In *Meier v. Allied Interstate LLC*, No. 20-55286, 2022 U.S. App. LEXIS 1413 (9th Cir. January 19, 2022) the Court analyzed a challenge to Live Vox's (famous) HCI system. HCI operates as a "click to dial" system but—as we know—post *Facebook* clicking to dial doesn't really matter anymore. What matters is whether numbers are produced or stored using an RoSNG.

It was undisputed in *Meier* that HCI does not generate numbers using an RoSNG—the question is whether it *stored* numbers using an RoSNG.

Plaintiff argued that it did store numbers using an RoSNG because it dialed numbers sequentially in the order in which they are received from a client. (Notably I doubt that's the way the system actually operates—but that was the argument as framed to the court.) In Plaintiff's view, dialing on a FIFO basis is *sequential* dialing.

The Ninth Circuit was not impressed. Recognizing that any dialing pattern is necessarily a sequence, adopting the Plaintiff's—bad—argument would convert all dialers into ATDS anew.

And while *Meier* is seemingly a pretty narrow ruling it contains great language on *Facebook's* problematic Fn7 that Defendants should take to heart:

*[Fn7] was not central to the Court's analysis of the equipment at issue in Duguid, and it does not require us to adopt Meier's expansive interpretation. The LiveVox system does not qualify as an ATDS merely because it stores pre-produced lists of telephone numbers in the order in which they are uploaded. Meier's TCPA claims therefore fail.*

Yes!

The Court also came very close to an outright rejection of a future capacity argument, although it doesn't quite get there.

The Plaintiff argued-again badly, because it didn't matter to begin with—that HCI was part of a larger suite of software offered by LiveVox and that LiveVox's other dialers qualify as an ATDS. So, the argument goes, HCI is also an ATDS since the LiveVox system has the capacity to be an ATDS.

In the first place nothing about the *Meier* court's ruling suggests that LiveVox's other dialers are an ATDS to begin with. So again, weird argument.

But the Court was not buying the “they can switch to a different mode” argument—which we have seen other courts adopt.

Instead, the *Meier* panel held that only the mode in which the calls were actually made to the Plaintiff matter:

*And although Allied had access to both the HCI and the Automated dialers, there is no dispute that each of the calls to Meier's cell phone was made using the HCI dialer. The fact that LiveVox offers multiple dialers to its customers does not bring every call that LiveVox makes within the scope of the TCPA. The district court thus correctly concluded that the HCI dialer does not qualify as an ATDS.*

Wow.

This is obviously a huge win for LiveVox and a great ruling for callers, ameliorated somewhat by the fact that the ruling is unpublished—boo!—and therefore cannot be relied on safely as precedent.

Still, I think *Meier* definitely takes the “all dialers are ATDS because they can call sequentially” argument off the table. It should also weaken FN7 arguments in the Ninth Circuit footprint—where they were already pretty weak already.

I am less convinced that the capacity argument is settled in the Ninth Circuit and I'd strongly advise callers not to grow enamored of the “its how we actually make calls and not the capacity of the system that matters” argument. Sensible though that is, Courts in the Ninth Circuit and elsewhere commonly look at capacity of the system—the word is in the definition after all—and not just the actual use of the system in assessing ATDS issues.

Still, let's celebrate today—even as we are watchful of tomorrow.

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