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Counter-punch: Northern District of Illinois Pulls Back From Marks By Holding (Again) That An ATDS Requires Allegations Of Random Or Sequential Number Generation To Survive An Early Dispositive Motion

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Early last week, as the Czar reported, TCPAWorld was a little taken aback by the Northern District of Illinois's apparent abrupt departure from the district's 2018 *Pinkus* decision, which had held that a dialing system must have the capacity for "random or sequential number generation" to qualify as an ATDS under the TCPA. That case, *Espejo v. Santander*, diverged from *Pinkus* and other district-level decisions in order to adopt the Ninth Circuit's expansive ATDS formulation in *Marks*. On Friday, however, Judge Coleman pulled no punches. Without mentioning either *Espejo* or *Marks*, Judge Coleman granted judgment on the pleadings in favor of a defendant by following the court's prior reasoning in *Pinkus*.

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The case is *Bader v. Navient Solutions, LLC*, 2019 U.S. Dist. LEXIS 100396 (N.D.Ill June 14, 2019). In *Bader*, the plaintiff, Abdelrahman Bader, alleged that Navient began calling his cell phone in August 2017 for the purpose of collecting a debt from a person identified as "Shavon Smith." Bader claimed that he informed Navient, on several occasions, that he was not the debtor it was looking for, and asked that Navient stop calling him. Bader also claimed that he "mailed a certified letter" to Navient in October 2017 also requesting that the calls stop. However, according to Bader, Navient continued to call him through 2018 (roughly 105 times).

Of interest to TCPAWorld, however, is how Bader characterized Navient's method of calling him. Specifically, Bader alleged that "[w]hen [he] would answer the phone, he would notice a five second pause before being connected with a live representative." The court, however, found that such allegations, at best, plausibly implied only that Navient used a "predictive dialer." So construed, the court explained that, "[w]hile this may have established the use of an autodialer under prior FCC declarative rulings," after *ACA International* a plaintiff must do more. Specifically, the court held that to adequately allege the use of an "autodialer," a plaintiff must allege "facts that make it plausible [that] [the defendant] . . . used equipment with the capabilities to generate numbers randomly . . . ."

In reaching that conclusion, the court explicitly cited *Pinkus* and its interpretation of the TCPA's "plain meaning," which clarified that a plaintiff fails to plausibly allege the use of an ATDS where he alleges "only . . . that the defendant used a predictive dialer to call it." The court also favorably cited post-*Pinkus* case law from the district, specifically *Gadelhak v. AT&T Services, Inc.*, which held that "equipment which dial[s] numbers from a generated list d[oes] not qualify as an autodialer."

In a clear, but restrained, rebuke of *Marks*, the court also relied directly on *ACA International*, noting that the D.C. Circuit had rejected as "an unreasonable expansion [of] the TCPA's statutory text" the FCC's prior determination that "equipment [which] dial[s] phone numbers from stored lists could qualify as an autodialer." Thus, because Bader failed to allege that Navient called his cell phone using equipment with random number generation

capabilities, the court granted judgment on the pleadings to Navient.

Courts throughout the country continue to duke it out over the proper interpretation of an ATDS in light of *ACA International*. And the *Bader* and *Espejo* decisions show that the fight can even lead to intra-district splits of authority. It is imperative, then, for defendants to continue bringing the ATDS fight in every case, especially in early dispositive motions. Like in *Bader*, such a strategy might just catch your opponent cold.

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