

LEGAL UPDATES

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Seventh Circuit Rules That the TCPA's Do-Not-Call Private Right of Action Does Not Cover Text Messages

In a significant victory for businesses defending against class action lawsuits under the Telephone Consumer Protection Act (TCPA), the United States Court of Appeals for the Seventh Circuit ruled yesterday that the TCPA provision permitting lawsuits over “telephone call” solicitations to certain phone numbers does not cover text messages. In *Steidinger v. Blackstone Medical Services*, the Seventh Circuit ruled that § 227(c) of the TCPA means what it says. If individuals are listed on the national Do-Not-Call Registry or have made a company-specific, do-not-call request, they can sue over unwanted telephone-solicitation calls. But not text messages. This decision substantially limits an explosive area of TCPA litigation.

Background: The TCPA and the Do-Not-Call Private Right of Action

The TCPA, enacted in 1991, is an incredibly dangerous statute. Designed to crack down on rogue telemarketers, it has become, in the words of the former chairman of the Federal Communications Commission, “the poster child for lawsuit abuse.” At \$500 to \$1,500 in statutory damages per violation (without any need to show actual damages), TCPA claims quickly add up. Class action lawsuits seeking tens of millions of dollars or more are not unusual.

Among the TCPA’s key provisions is § 227(c)(5), which creates a private right of action for individuals who receive “more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the [FCC] regulations,” implementing the national Do-Not-Call Registry and company-specific do-not-call requirements. For nearly two decades, plaintiffs have been filing suit under § 227(c) for telephone solicitations received by text message.

And courts routinely endorsed this reading. In doing so, these courts largely deferred to the FCC's expansive definition of "call" to include text messages. But in two recent decisions, the Supreme Court drastically limited that deference and expanded the ability of defendants to challenge FCC pronouncements. See our prior legal update, *Supreme Court Clarifies District Courts' Independence from FCC's TCPA Interpretations*.

The Seventh Circuit's Decision

The plaintiffs in *Steidinger* alleged that Blackstone Medical Services sent them marketing text messages even though they had indicated they did not want to be contacted, including by replying "STOP" to Blackstone's texts and by registering their numbers on the National Do-Not-Call Registry. They filed a consolidated class action complaint asserting violations of § 227(c)(5).

The Seventh Circuit affirmed dismissal of the plaintiffs' TCPA claims. In doing so, the Seventh Circuit engaged in a thorough analysis that proceeded along four tracks.

First, the Seventh Circuit considered the ordinary meaning of "telephone call." As an initial matter, the Seventh Circuit observed that, when the TCPA was passed in 1991, text messages did not exist (the first was sent a year later, in 1992). Next, the Seventh Circuit observed that, in 1991, a telephone was an "instrument for reproducing sounds at a distance" and a call meant getting into communication by telephone. In other words, a "telephone call" referred to sound-based communication. Because text messages do not reproduce sounds, they do not qualify as a new application of the term—even accounting for the principle that statutory terms can have new applications as technology evolves. The Seventh Circuit rejected the plaintiffs' broad "march of technology" argument.

Second, the Seventh Circuit looked to the surrounding statutory context. While § 227(c)(5) creates a private right of action only for receipt of unwanted "telephone calls," other provisions of § 227(c) consistently use the broader term "telephone solicitation," which the TCPA defines to include both telephone calls and messages. The TCPA also regulates fax-based communications (another form of text-based communication by telephone) as "messages," not "calls." Because Congress used different terms in different subsections, the Seventh Circuit applied the meaningful-variation canon and the canon against surplusage: § 227(c)(5)'s use of "telephone call" (rather than "telephone solicitation") was intentional and provides a narrower remedy, covering only voice calls.

Third, the Seventh Circuit dispatched with a favorite line of argument from the plaintiffs' bar. Contrary to that argument, the Seventh Circuit explained, the Supreme Court's statement in *Campbell-Ewald Co. v. Gomez* that a text "qualifies as a 'call' within the compass of § 227(b)(1)(A)(iii)" was merely an uncontested assumption for purposes of that case—not a substantive ruling—as the Supreme Court itself later confirmed in *Facebook, Inc. v. Duguid*. The

Seventh Circuit similarly distinguished precedent from itself and other Circuit Courts that addressed § 227(b) or pre-dated recent Supreme Court developments (or both).

Fourth, as for the FCC's view that "call" includes texts, the Seventh Circuit stressed the change in the landscape. The Seventh Circuit noted that courts are not bound by the FCC's interpretation. Instead, courts must independently interpret the TCPA rather than defer to the FCC.

What This Means for You

This is a significant defense victory. *Steidinger* forecloses class action suits under § 227(c)(5) predicated on unwanted text messages in the Seventh Circuit (which covers Illinois, Indiana, and Wisconsin). The decision's reasoning is methodical, grounded in both textualism and structural statutory analysis, and is likely to be influential elsewhere. Given that text-message cases have been a growing area of TCPA class action activity, *Steidinger* is a welcome development that narrows the exposure that businesses in the Seventh Circuit face.

That said, there are important points to keep in mind:

The decision addresses only § 227(c)(5). Cases involving voice calls remain as dangerous today as they were yesterday.

Congressional action remains possible. Congress could extend § 227(c)(5) to cover text messages, as it has done for other provisions when it wanted to add texts expressly (*see, e.g.*, the 2018 amendment to § 227(e)). Businesses should monitor legislative developments.

Contact Us

Husch Blackwell regularly defends clients in class actions under the TCPA and other so-called "consumer protection" statutes. In addition, Husch Blackwell regularly advises clients on compliance with these laws. Please contact Scott Helfand, Becky Bavlsik, or your Husch Blackwell attorney for more information.