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Should Text Messages be Considered "Calls" Under the TCPA? The Seventh Circuit Says No

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In a decision with potential far-reaching consequences, the Seventh Circuit Court of Appeals recently affirmed dismissal of a putative class action related to unwanted text messages under the Telephone Consumer Protection Act (TCPA), **finding that text messages do not equal calls and are therefore not covered by section 227(c)(5) of the TCPA.**

The Seventh Circuit's decision ultimately conflicts with decisions from other circuit courts and could result in the US Supreme Court deciding the issue once and for all.

What Happened?

- The plaintiffs received numerous marketing text messages from the defendant, even after they asked them to stop (or by adding themselves to the Do-Not-Call Registry). In response, they filed a putative class action under the TCPA.
- The defendant then moved to dismiss and argued that § 227(c)(5), the provision on which the plaintiffs' claims for relief are based, only creates a private right of action for phone calls, not text messages.
- The district court agreed, dismissed the TCPA claims, and declined to exercise supplemental jurisdiction over the plaintiffs' state law claims. The plaintiffs then appealed.

Plain Meaning = A Text Message Does Not Equal a Telephone Call

On appeal, the Seventh Circuit Court of Appeals affirmed the district court's decision and found that a text message is not a telephone call for purposes of § 227(c)(5) of the TCPA.

That section provides for a private right of action for any person "who has received more than one **telephone call** within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection[.]"

As the court noted, it is undisputed that a "telephone call" could have included text messages when the TCPA was enacted in 1991; the first text message was not sent until the next year. So the court looked into what "telephone call" meant back in 1991.

Because the TCPA does not define the term, the court looked to contemporaneous dictionary definitions. As the court noted, in 1991, "a telephone was an instrument for reproducing sounds at a distance[.]" Because text messages do not reproduce sounds, they did not meet the definition of a telephone call back in 1991.

The Plaintiffs' Arguments

The court also concluded that the provisions surrounding § 227(c)(5) provided further support for this plain reading of the term telephone call. For example, §§ 227(c)(3) and (4) relate to creating a national database for individuals to object to receiving "telephone solicitations," a term specifically defined to include more than telephone calls.

The court found it telling that Congress used two different terms within the same statutory scheme and rejected the plaintiffs' argument that those different terms should not be given different meanings.

The plaintiffs, however, rejected that conclusion and raised a number of policy-related arguments that the court rejected outright:

- **For instance, the plaintiffs contended that the term telephone call should be read broadly to encompass text messages,** otherwise "the TCPA's protections will become increasingly ineffectual as new technologies emerge." But the court found that the "march of technology" alone was insufficient to ignore the plain meaning of the statute.
- **Next, the plaintiffs argued that decisions by the Supreme Court and other circuits undermine the defendants' argument.** This, too, was rejected. The Seventh Circuit found that the Supreme Court cases relied upon by the plaintiffs never actually decided what the term "call" meant, noting that the parties never argued that issue, and rejected the other circuit courts' decisions on that same basis.
- **The court also rejected the plaintiffs' plea to consider the FCC's interpretation of the term "call,"** noting that under recent Supreme Court precedent, it is no longer bound to defer to the agency's determination.
- **Finally, the court rejected the plaintiffs' public policy arguments,** noting that "the plaintiffs' policy arguments and broad invocation of the TCPA's remedial nature cannot overcome the clear commands of § 227(c)(5) 's text and the statutory context."

What Does It Mean?

The Seventh Circuit's ruling is binding on Illinois, Indiana, and Wisconsin, and means TCPA class actions under § 227(c)(5) for unwanted marketing text messages in those states are effectively dead. But this decision is only binding in the Seventh Circuit, meaning that other courts could rule differently on the issue. Furthermore, the FCC retains the ability to regulate unwanted text messages under the TCPA.

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