

Unconsented texts to DNC numbers: No private right of action under TCPA

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The Telephone Consumer Protection Act (TCPA) provides a private right of action to Do Not Call (DNC) number registrants who receive more than one “telephone call” within a 12-month period from the same entity that violates the Federal Communications Commission Rules (47 U.S.C. 227(c)(5)) (Section 227(c)(5)). Over the last year, at least 10 Federal District Court decisions have held that texts are not “telephone calls” for purposes of that provision. However, at least twice that many have held that they are. You can see where this division of view is likely headed.

Most recently, in a well-reasons decision, a panel of the US Court of Appeals for the 7th Circuit (Court) in [Seth Steidinger et al v. Blackstone Medical Services](#) voted “no” – affirming that “Section 227(c)(5) does not permit plaintiffs to sue for the receipt of unwanted texts.”

Background

Blackstone made marketing texts and calls urging called parties to buy the company’s home sleep tests. The calls continued even after plaintiffs replied “STOP” or added themselves to the National Do Not Call list. After plaintiffs filed a class action under Section 227(c)(5), Blackstone moved to dismiss, arguing that the provision does not cover unwanted text messages, only telephone calls. The Federal District Court in Illinois agreed in [Seth Jones et al. v. Blackstone Medical Services](#). The 7th Circuit appeal ensued.

The Court’s findings and conclusions

The Court thoroughly and effectively deals with key points of statutory interpretation and plaintiffs’ arguments in support of its conclusion. The essential supporting points in the panel’s ruling include the following:

- Based on the ordinary public meaning of “telephone call” at the time of the TCPA’s enactment in 1991, texts are not calls, so Section 227(c)(5) does not authorize the plaintiff’s suit.
- The provisions surrounding Section 227(c)(5) refer to “telephone solicitations,” which include the “initiation of a telephone call or message.” These terms are absent from Section 227(c)(5).
- As a result, the overall statutory scheme and the ordinary meaning of “telephone call” indicate that Section 227(c)(5)’s private right of action does not extend to unwanted text messages.
- Plaintiffs’ citations to cases relying on other provisions of Section 227 do not require otherwise.
- The Federal Communications Commission’s (FCC) implementation of the DNC registry was under a provision that related to “telephone solicitations,” so it does not inform the understanding of Section 227(c)(5), which refers only to “telephone calls.”
- In any case, under the Supreme Court’s *McLaughlin Chiropractic* decision, the Court is not bound by the FCC’s statutory interpretation.
- Congress’ repeated amendment of the TCPA in other provisions without challenging the FCC’s regulation of text messages cannot be translated into inclusion of text messages within the term “telephone calls” in Section 227(c)(5). Congress could have amended that Section to include texts, but it did not.
- The statutory presumption of consistent usage – including text messages in another section of the statute means it must have been intended to be included in 227(c)(5) – does not apply here because the cited provisions include different language.
- Congress’ general concern about intrusive telemarketing practices also does not necessarily mean it adopted a broad definition of “telephone call.”
- Finally, while unwanted text messages do not fall within the private right of action pursuant to Section 227(c)(5), they may be curbed by other provisions of the TCPA, which the Court left “undisturbed.”

So, what is potentially next?

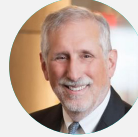
Certainly, this ruling provides a roadmap for other appeals if brought in connection with the cases finding that texts are included. District courts also facing the issue can perhaps rely on the ruling, although it is currently only governing law in the three states of Illinois, Wisconsin and Indiana, which comprise the 7th Circuit.

Perhaps it provides a framework for the Supreme Court. As the Court here observes, "Here, the parties dispute the meaning of telephone call, so we confront a question that the Supreme Court hasn't answered." Ultimately, if a conflict in the circuits ensues, the question may make it to the Supreme Court's docket.

Congress is the other actor that could step in to resolve the divide on this issue. But legislative activity on the TCPA has been quiet of late, including on this issue. A recent bill reintroduced in Congress, the [Protecting American Consumers from Robocalls Act](#), would make amendments to the TCPA, but does not address the unwanted text issue.

One other reminder regarding scope: the ruling applies to texts to numbers on the DNC under Section 227(c). As the Court observed, texts are covered under other provisions of the TCPA and the ruling left those "undisturbed."

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