

Telemarketing Lawsuits Fueled by Regulatory Uncertainty

6th Edition: Trends in Marketing Communications Law

Recent developments continue to highlight the high risks associated with class action lawsuits brought under the Telephone Consumer Protection Act (TCPA). With statutory damages of up to \$1,500 for a single unauthorized text message, consumers are highly incentivized to bring lawsuits for violations of the TCPA, which regularly settle for multimillion-dollar figures. While the pace of TCPA litigation shows no signs of slowing down, marketers face regulatory ambiguity, making the parameters of how to text and call consumers while avoiding liability often unclear. This year will bring important developments on this front, with anticipated rulemaking from the Federal Communications Commission (FCC) as well as decisions from the courts, including the U.S. Supreme Court, continuing to shape the regulatory landscape.

Companies that call or text consumers using autodialers are subject to increased regulation, yet the legal definition of an autodialer remains unclear. The FCC's expansive autodialer definition from its 2015 Declaratory Ruling was struck down by the D.C. Circuit in 2018's *ACA International* ruling, but the Ninth Circuit's decision in *Marks v. Crunch Fitness (Marks)* created a circuit split by essentially reverting to the earlier broad definition of an autodialer as "a device with the capacity to automatically dial stored numbers." Following the decision, the FCC sought public comment on the autodialer definition and is expected to issue new guidance. It remains to be seen whether courts in the Ninth Circuit will follow the FCC's new rules or will continue to follow the precedent set in *Marks*.

In the meantime, courts continue to decide key telemarketing compliance issues, such as the distinction between informational/transactional calls and texts and those that constitute telemarketing/advertising and require increased levels of consumer consent. In *Phan v. Agoda*, the plaintiff booked a hotel with the defendant's travel website and received confirmation texts with a link to the company's app. The plaintiff argued that the app promoted the company's products and services and therefore the texts constituted telemarketing communications necessitating prior express written consent. The court disagreed because the app allowed the consumer to manage their reservation and trip details, and therefore the texts were transactional. Although the decision represents a win for marketers, it also shows how difficult it can be to draw a line between informational and telemarketing texts.

Key Takeaways

- The FCC may resolve ambiguity over the autodialer definition but, in the meantime, marketers should be aware of the Ninth Circuit's broad definition and plan accordingly.
- The line between informational and telemarketing text messages and calls is not always clear. Marketers can seek to minimize risk by carefully crafting the content of any planned transactional messages and consulting with counsel to develop a telemarketing compliance strategy.

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