

CLOSE CALL: Kohl's Loses Key Argument as Court Holds TCPA DNC Provisions Apply to Text Messages and There Is a Story Here

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So we know the FCC's big NPRM proceeding involving the TCPA [might shut down the entire lead generation industry](#), but any folks have forgotten that the Commission is also looking at formally extending TCPA DNC provisions to include text messages.

This second piece *seems* like a big deal, but since courts have uniformly applied the TCPA to text messages—even though Congress never gave them authority to do so—it is something of a nothing burger.

Except that fact that the FCC is looking to *extend* the TCPA's DNC provisions to text messages does suggest the FCC does not currently believe the law reaches texts. And that was exactly the argument raised by Kohl's in a TCPA robotext case it is facing in Wisconsin.

In *Reimer v. Kohl's, Inc.* 2023 WL 6161780 (D. Wisc. Sept. 21, 2023) Kohl's moved to dismiss a suit alleging it ignored multiple DNC requests and continued to send Plaintiff promotional text messages without consent.

Kohl's argued that the FCC's recent NPRM seeking to extend TCPA DNC protections to text messages means the law currently does not apply to text messages. And while Kohl's acknowledged the ATDS provisions of the TCPA applied to text messages it asserted the DNC provisions did not.

Plaintiff countered that the NPRM uses the word “clarify” in addition to the word “extend”—and clarifications are generally given retroactive impact (a very important point in connection with the current NPRM) because they are merely the assertion of the law as it has always been.

Now interesting footnote here—the original version of the NPRM had repeatedly used the word “extend.” But the NCLC got involved with a filing before the NPRM was formally issued and asked the [FCC to change the language in places from “extend” to clarify](#) specifically because the NCLC wants to keep the plaintiff's lawyers happy.

But the NCLC did not pick up on every use of the word “Extend” in the NPRM—and neither did the FCC apparently—so the NPRM now uses *both* the word “extend” and “clarify”—even though these

two concepts are mutually exclusive in this context.

Ultimately the *Reimer* court concluded the language used by the FCC was contradictory so it performed its own review of the existing law and determined that texts are already covered by the TCPA—including the DNC provisions. Hence it determined the FCC's NPRM was merely intended to clarify existing law.

Hence it denied Kohl's motion and it is stuck in the case.

Really fascinating ruling here—especially when you know the back story. Ultimately tough this is no surprise. While the FCC's NPRM opened up an interesting argument, I think most courts will side with *Reimer* and conclude texts are covered by the TCPA DNC provisions here.

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National Law Review, Volumess XIII, Number 265

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