

"Conscious Choice": Massive First-In-The-Nation TCPA Ruling Holds MMS Video Messages are NOT “Pre-Recorded” Calls– Gives Republicans Huge Victory in AZ

Article By:

Eric J. Troutman

Editor’s Note: there were actually two decisions handed out the same day by the same judge on the same topic. The first is discussed below. The second is Crawford v. NRA, 2023 WL 7301864 (D. Az. 11/06/2023).

Wow. Good morning TCPAWorld, this is a big one.

So a few months back the Ninth Circuit Court of Appeals handed down the Trim v. Rewards Zone ruling—yes, the same ruling that just resulted in a cert. petition to the U.S. Supreme Court.

While *Trim* addressed the TCPA’s ATDS definition, the bigger piece of the ruling was a determination that SMS messages are not “prerecorded voice” messages under the TCPA. The holding turned on the assumption that SMS messages are *text* messages that lack any audible component.

Ok great, but what about MMS messages that *do* contain audible components?

Well the Ninth Circuit held open that issue in *Trim*, noting that such messages might be prerecorded messages:

N. 4: ” a “text” call could come via MMS (Multimedia Messaging Service), which could include audio sound with an artificial or prerecorded voice.”

Ruh roh.

In *Howard v. Republican National Committee*, 2023 WL 7301861 (D. Az. Nov. 6, 2023), however, the Court held the use of MMS messages to send political videos by the RNC did NOT constitute the use of a prerecorded voice message because the user could choose whether or not to listen to the message.

In *Howard* the RNC was sued for allegedly sending an MMS with a video of Ivanka Trump encouraging folks to vote. Plaintiff sued claiming the message constituted a prerecorded voice message sent without express consent. But the Court disagreed determining that Plaintiff *chose* whether or not to listen to the message so Defendant was not liable:

*Plaintiff alleges that Defendant sent him a MMS text which included a video with a prerecorded audible component. (Doc. 1 at 5). However, Plaintiff does not allege that the video immediately started playing with audio, or that a separate audio track began reading the text of the message aloud. (See id. at 4-6, 9-11). Plaintiff has alleged that the video automatically downloaded to his phone, but based on the screenshot in the Complaint, Plaintiff had to actively press play on the link to watch the video. (Id. at 5). Thus, the Court finds that the message provided a **conscious choice** of whether to engage with the audible component, but that this is different from what the TCPA intended by “make a call” using an “prerecorded voice.” § 227(b)(1)(A)(iii)*

Woah!

So the Court in *Howard* determined an MMS is not a prerecorded voice message unless it automatically plays!

Interesting, no?

The Plaintiff argued that the situation is the same as with prerecorded voicemails—which most courts do find to be prerecorded calls—but the *Howard* court was not buying it. Concluding that courts view SMS and voice calls differently, the Court determined that the rule for one was not the

rule for the other (which is a little intellectually unsatisfying, saying they are not the same does not answer the question of why the rule for one ought not apply to the other— but we'll take the win!)

So there you have it. The first court in the nation to look at the issue has held that MMS messages containing video are NOT prerecorded voice calls under the TCPA unless they play automatically.

I must caution everyone here, this is a FIRST result. By no means will this be the last word on the subject. So BE CAREFUL!!!

For the curious, the Judge ruling on this case—the Hon. Steven Paul Logan—was an Obama appointee.

© 2024 Troutman Amin, LLP

National Law Review, Volumess XIII, Number 311

Source URL:<https://www.natlawreview.com/article/concious-choice-massive-first-nation-tcpa-ruling-holds-mms-video-messages-are-not>