



DIRECT DROP VOICEMAILS COVERED BY THE TCPA

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In *Saunders v. Dyck O’Neal, Inc.*, No. 1:17-CV-335, 2018 WL 3453967 (W.D. Mich. July 16, 2018), defendant argued that its “direct drop” voicemails are not covered by the Telephone Consumer Protection Act (“TCPA”). The court disagreed and denied Dyck O’Neal’s motion for summary judgment. *Id.* at *1.

Dyck O’Neal attempted to collect on a mortgage loan by delivering voicemails to Saunders’ telephone. *Id.* at 2. To do so, “Dyck O’Neal contracts with VoApp, a third-party vendor, to deliver messages to individuals’ voicemails using VoApp’s ‘DirectDROP’ voicemail service. Rather than call the target’s phone number and wait to reach the target’s voicemail, VoApp utilizes technology to reach the target’s voicemail through a back door. Specifically, VoApp’s Adaptive Signaling technology “causes the mobile switch to make a call to a phone number assigned to the voicemail service provider’s enhanced service platform (i.e. the voicemail computer or server), not the consumer’s phone number.” (ECF No. 27 at PageID.97.) By routing the message through the voicemail server itself, VoApp is able to deliver a voicemail message to the server space associated with the consumer²—the consumer then receives a notification that she received a new voicemail message, but without having received a traditional call.” *Id.* Dyck O’Neal argued direct drop voicemails are not “a call” under the TCPA because this technology does not include the traditional dialing of a consumer’s telephone number. *Id.*

Direct drop (also known as ringless) voicemail technology has been on the market for years with increasing popularity. The FCC has yet to take a definitive stance on whether this technology is covered by the TCPA and this is the first judicial ruling.

On July 31, 2014, VoAPPs filed a petition before the FCC seeking confirmation that this technology was beyond the reach of the TCPA.¹ On June 11, 2015, VoApps withdrew its petition before the FCC ruled.² All About the Message, LLC filed a very similar petition on

¹ *Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, filed by VoApps, Inc. on July 31, 2014.

² <https://ecfsapi.fcc.gov/file/60001077815.pdf>

March 31, 2017.³ The FCC accepted comments on this latter petition through June 2, 2017. Aside from the Republican National Committee, there was fierce opposition to the All About the Message, LLC petition. It was withdrawn on June 20, 2017.⁴

In deciding this “case of first impression,” (*id.* at *2) the *Saunders* court first notes “the statutory purpose of the TCPA, i.e., to protect the privacy interests of individuals from the nuisance and invasion of privacy by automated telephone calls....” *Id.* at *3.

The court then looked at other technology considered “a call” for purposes of the TCPA. For example, the court points to language in *Keating v. Peterson’s Helnet, LLC*, 615 F.App’x 365, 370 (6th Cir. 2015) – “that Congress did not address, or even intend to address, the treatment of text messages when considering and passing the TCPA.... We thus unhesitatingly afford deference to the [FCC] holding that a text message should be treated as a ‘call’ for purposes of the TCPA.” *Saunders* at *3. Citing *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009), the court found “that a voice message or a text message are not distinguishable in terms of being an invasion of privacy.” *Saunders* at *3.

The court next looked to the FCC’s history of broadly construing the language of the TCPA to include new technologies such as text messages whether sent by a telephone, email, or web browser: “Both the FCC and the courts have recognized that the scope of the TCPA naturally evolves in parallel with telecommunications technology as it evolves, *e.g.* with the advent of text messages and email-to-text messages, or as we have here, new technology to get to a consumer’s voicemail box directly.” *Id.*

The court ultimately held that Dyck O’Neal’s “use of direct to voicemail technology is a ‘call’ and falls within the purview of the TCPA.” *Id.* The court reasoned that “[t]he effect on *Saunders* is the same whether her phone rang with a call before the voicemail is left, or whether the voicemail is left directly in her voicemail box....” *Id.* at *4.

Severson & Werson will continue to monitor and report on TCPA and direct drop voicemail developments. For questions, please contact Genevieve Walser-Jolly at grw@severson.com, or any member of Severson & Werson’s TCPA practice group.

³ *Petition for Expedited Declaratory Ruling*, All About the Message, CG Docket No. 02-278, Filed by All About the Message, LLC on March 31, 2017.

⁴ <https://ecfsapi.fcc.gov/file/1062101171891/2017-06-20%20Letter%20to%20Ms.%20Dortch.pdf>