

# **Trim v. Reward Zone USA LLC: Text Messages Are NOT Prerecorded Voice Messages**

## **Text Messages Are NOT Prerecorded Voice Messages**

□ On August 8, 2023, the Ninth Circuit Court of Appeals issued a major win for both Telephone Consumer Protection Act (“TCPA”) defendants and the industry at large. In *Trim v. Reward Zone USA LLC*, the Plaintiff set forth the novel argument that the text messages she received violated the prerecorded voice restrictions contained in the TCPA. TCPA plaintiffs have demonstrated increased creativity in their TCPA cases following the U.S. Supreme Court’s decision in *Facebook, Inc. v. Duguid*. Readers will recall that in *Facebook*, the Supreme Court narrowed the TCPA’s definition of what constitutes an automatic telephone dialing system (“ATDS”). In *Trim*, Plaintiff set her sights on the last clause of 47 U.S.C. § 227(b)(1)(A), which prohibits calls made using “an artificial or prerecorded voice.”

In a case of first impression for the circuit courts, the Ninth Circuit held that the text messages at issue did not contain prerecorded voice as contemplated by the TCPA because they did not include audible components. In representing the Defendant in this action, the ruling is a major victory for Klein Moynihan Turco on behalf of not only Reward Zone, but the entire telemarketing industry, as it closed a path to TCPA liability that plaintiffs had begun to explore.

# The Prerecorded Voice Analysis in Trim

□ In Trim, the Ninth Circuit decided two distinct issues, namely whether the disputed text messages: 1) were sent using an ATDS; and/or 2) utilized prerecorded voice. On the first issue, the Court found that Plaintiff's ATDS arguments were foreclosed by binding Ninth Circuit precedent and, thus, had been properly dismissed by the lower court. On the second issue, the Court held that the alleged text messages did not use prerecorded voice and, thus, did not implicate section 227(b)(1)(A) of the TCPA.

The TCPA does not define "artificial or prerecorded voice." It was due to this lack of a statutory definition that Plaintiff sought to fill the void by arguing for an "idiosyncratic" definition of voice as "an instrument or medium of expression." However, the Court disagreed that such an esoteric definition is appropriate given the facts at issue. Using "traditional tools of statutory interpretation," the Court began its analysis by turning to the ordinary meaning of the word "voice" at the time that Congress enacted the TCPA. It found that ordinary definitions of "voice" integrate audible sound and that, as a result, the most natural understanding of "voice" is the sound produced by one's vocal system.

The Court also analyzed the broader context of the TCPA to conclude that prerecorded voice does not encompass text messages. Specifically, the Court drew heavily from the fact that Congress utilized the word "voice," as typically used, elsewhere in the TCPA. For example, § 227(e)(8)(A)) defines "caller identification information" as "information regarding the origination of . . . a call made using a voice service or a text message sent using a text messaging service." The Court noted that if voice calls included text messages, Congress' inclusion of the term "text message" later in the sentence was

unnecessary. That Congress understood how to distinguish voice from text messages in one part of the statute ultimately meant that it could not have intended to have “voice” include text messages in another part of the statute.

Based on ordinary meaning and statutory context, the Court determined that “voice,” as contemplated by the TCPA, does not allow for an interpretation that would otherwise extend to text messages. Accordingly, the subject text messages could not possibly have implicated the § 227(b)(1)(A) restriction on “prerecorded voice” messages. In so finding, the Ninth Circuit comprehensively rejected Plaintiff’s attempt to broaden the definition of prerecorded voice to include text messages.

## **Why Does Trim Matter to Your Business?**

□As previously mentioned, the Facebook decision has made filing claims under the TCPA more complicated for plaintiffs. Specifically, many TCPA plaintiffs are having difficulty establishing that equipment employed by a defendant qualifies as an ATDS. Because of this, plaintiffs are relying on other, less commonly utilized, provisions of the statute. Trim is an example where an enterprising plaintiff attempted to contort the plain language meaning of “voice” as used in the TCPA, in order to significantly expand the potential scope of liability for text messages under the statute.

Fortunately for the industry, the Ninth Circuit agreed with arguments that we submitted on behalf of Reward Zone insofar as the ordinary definition of “voice” is concerned. While extremely favorable to the telemarketing industry at large, the Trim decision does not mean that businesses do not need to continue to prepare themselves for incoming lawsuits filed under other provisions of the TCPA.

Given the ever-changing landscape of TCPA litigation, it is

important that businesses regularly consult with experienced telemarketing law counsel. Our attorneys have defended countless lawsuits filed under different provisions of the TCPA. Trim is one of many cases in which we have prevailed on behalf of our clients.

If you are interested in working with attorneys who can help your business with all of its telemarketing law needs, please email us at [info@kleinmoynihan.com](mailto:info@kleinmoynihan.com) or call us at (212) 246-0900.

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