

Ringless Voicemail Compliance: 2021 Forecast (You're Going to Get Sued For Using It)

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Ringless Voicemail (“RVM”) technology provides companies the ability to reach a massive amount of people with low cost by avoiding typical telephony charges. RVM works by sending a voicemail message via server-to-server communication, bypassing the need for a consumer’s telephone to ring. From the consumer’s perspective, there is no ringing telephone or missed call notification. Advocates argue that RVM is more time efficient due to the large number of telephone calls that are unanswered and is also less intrusive on consumers because it does not result in a ringing telephone. Critics argue that the practice is potentially more intrusive by filling up voicemail inboxes, particularly if RVM technology gains more widespread use.

Years ago, we [started reporting](#) on the potential benefits and drawbacks of using RVM to contact consumers, and the potential liability it creates under the Telephone Consumer Protection Act (“TCPA”). RVM has continued to increase in use, and with it, more companies are being sued for potential violations of the TCPA, with a notable spike in 2020 for RVM-related lawsuits. Defendants continue to argue that RVM is exempt from the TCPA, and courts continue to routinely reject these arguments. Let’s talk about why.

First, many RVM companies are, in my opinion *falsely*, marketing their RVM products as “TCPA compliant.” Because RVM “drops” a voicemail onto the recipient’s phone and there is no ringing telephone, some argue that RVM does not involve making a “call,” and is therefore not subject to the TCPA. Now, there is a technical argument to be made in support of this.

But every court to date, literally *every court*, has rejected that argument. Given that the TCPA was enacted in 1991, before things like RVM or text messaging even existed, courts and the FCC have consistently recognized that the TCPA and its terms should be construed in relation to new technologies that emerge that could attempt to circumvent the statute. Applying this framework, every single court to have addressed the issue to date has concluded that the use of RVM still constitutes a “call” and is subject to the TCPA, because it constitutes an attempt to communicate by telephone. Any RVM provider that says its product is “TCPA compliant” because RVM does not make “calls” is selling a bill of goods, in my opinion. Don’t fall for it. You will get sued, and when you repeat the sales lines they gave you to the court, you will lose.

The second way in which many RVM providers are, again in my opinion *falsely*, marketing their products as “TCPA compliant” is by stating that their products will scrub against numbers on the national Do Not Call (“DNC”) Registry. While compliance with the DNC Registry is certainly important, it is just one part of TCPA compliance. But just because a company’s use of RVM is DNC compliant does not mean that it is TCPA compliant.

The TCPA can be a nuanced statute, but generally speaking, this is the key legal problem with how many companies are using RVM:

- **Placing a call to a cell phone using an artificial or prerecorded voice is illegal, unless the caller has at least the prior express consent of the called party.**

In other words, dropping RVM on cell phones is illegal without some type of prior express consent. The purpose of the message does not matter. Even if a company is not engaging in telemarketing, sending RVM messages to cell phones is illegal without consent; you can send a RVM to your best friend wishing him or her a happy birthday, and it is still illegal unless you have prior express consent.

Bottom line: “Cold-calling” by sending RVMs to cell phones is 100% illegal, every time, regardless of the purpose of the RVM message.

Also, if a company is using RVM as a means of solicitation or advertising, simply having “prior express consent” is not enough. The TCPA requires “prior express written consent,” and there are very specific requirements for what is necessary for valid written consent; it’s not enough to simply get a general statement of consent in writing.

The consequences of violating the TCPA, even if inadvertent and unintentional, can be catastrophic. The TCPA imposes penalties of up to \$1,500 per call in violation of the statute. That is, \$1,500 for each and every illegal RVM. Those penalties quickly add up. If you have been using RVM for cold calling cell phones, take the total number of RVMs you have dropped and multiply that by 1,500 to determine what your potential liability would be if someone were to ever sue you in a class action lawsuit.

Would that sum cripple your business? Do you think there is no way that a court would ever impose such extreme monetary damages for something that, even if illegal, is such a nominal nuisance? ViSalus, Inc. is still fighting to get a *\$925 million*-that’s right, just a little bit shy of one billion dollars-TCPA verdict set aside, with the court continually affirming the jury verdict going on two years later. *Wakefield v. Visalus, Inc.*, No. 3:15-cv-1857-SI, 2021 U.S. Dist. LEXIS 28507 (D. Or. Feb. 16, 2021). In December 2020, DISH Network settled a decade long dispute with the Department of Justice for alleged TCPA violations, for the sum of \$126 million. Given the large number of TCPA class action lawsuits, improper use of RVM may result in potentially crippling damages for a business, far exceeding whatever benefit or cost-savings is realized in the short-term.

RVM has great potential and can be used legally. But do not simply rely on an RVM provider’s assurances or marketing materials that its product is “TCPA compliant.” Businesses must independently evaluate their intended use of any RVM campaigns, including who is being called, the type of telephone number being called, the purpose of the message, and (if applicable) the type of consent necessary, relative to the TCPA’s requirements to ensure compliance.

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