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SMS “Text Message” Advertisers Beware*Recent Federal Court Rulings Hold Text Messages are “Calls” within the Meaning of the Telephone Consumer Protection Act*

In recent decisions addressing issues relating to the use of Short Message Services (“SMS”) to send advertising and marketing text messages, courts have held that text messages qualify as “calls” within the meaning of the Telephone Consumer Protection Act (“TCPA”).¹ Accordingly, marketers and advertisers should be aware that any advertising or marketing text message sent to consumers without the consumer’s express consent likely constitutes a violation of the TCPA punishable by damages of \$500 to \$1,500 per text message.

Telephone Consumer Protection Act

The TCPA makes it unlawful to make any call (other than emergency calls or calls made with the prior express consent of the called party) using an automatic telephone dialing system to any telephone number assigned to any service for which the called party is charged for the call, including, for example, a paging service or cellular telephone service.

An “automatic telephone dialing system” is defined as “equipment which has *the capacity* ... to store or produce telephone numbers to be calculated, using a random or sequential number generator; and ... to dial such numbers.”² In *Satterfield v. Simon & Schuster, Inc.*,³ a federal appeals court held that the focus of determining whether a device qualifies as an “automatic telephone dialing system” under the statute must be on whether the equipment has *the capacity* to store or produce telephone numbers to be called using a random or sequential number generator – not whether it has actually done so.

In the relatively recent case of *Kazemi v. Payless Shoesource, Inc.*,⁴ the court decided essentially that any “en masse” text message marketing or advertising campaign must comply with the requirements of the TCPA. In order to meet the threshold requirements for alleging a TCPA violation, the court held that a plaintiff need only allege that the received messages were formatted in SMS short code licensed to defendants, scripted in an impersonal manner and sent en masse.

Under the TCPA, Text Messages are Still “Calls”

In the *Satterfield* case, the court deferred to the Federal Communications Commission’s (“FCC”) definition of “call” and held that a text message is a “call” within the

TCPA. At least two recent court decisions in the Northern District of Illinois have followed that finding, holding that a text message is a call within the TCPA and that a defendant can be found to have violated the TCPA even if the plaintiff is not charged for the text message in question.⁵

Consumer Consent Protects Against TCPA Violations

In the *Satterfield* case, the federal appeals court rejected Simon & Schuster’s argument that a consumer consent to receive texts from Nextones.com should apply to text messages sent by Simon & Schuster. Ms. Satterfield (the plaintiff in the case) joined Nextones at the request of her minor son to obtain a free ringtone. In doing so, she checked a box opposite the following text:

Yes! I would like to receive promotions from Nextones affiliates and brands. Please note, that by declining you may not be eligible for our FREE content.

Next, she pressed the submit button. Subsequently, she received a text message from Simon & Schuster advertising its publication of Stephen King’s novel, *Cell*. The court found that no express consent had been given by Satterfield, because the consent covered only receiving promotional material from Nextones or their affiliates and brands. The court focused on the technical legal significance of the term “affiliate,” which refers to a corporation that is under common control with another corporation by shareholdings or other similar arrangements. Because Nextones and Simon & Schuster were not subsidiaries or otherwise part of the same corporate group, the court held that Ms. Satterfield’s consent to receive promotional material by Nextones and its affiliates and brands cannot be read as consenting to the receipt of Simon & Schuster’s promotional material. The lesson of *Satterfield* is simple: companies should ensure that they obtain the proper consumer consent when implementing an SMS or text message advertising and marketing campaign.

A Plan for Obtaining Consumer Consent

Companies wishing to advertise via text message should ensure that they first receive express consent from consumers. That consent should contain the following clear and unambiguous information:

Offices

Atlanta
 Austin
 Chicago
 Dallas
 Houston
 London
 Los Angeles
 New Orleans
 New York
 Sacramento
 San Francisco
 Washington, DC

SMS “Text Message” Advertisers Beware (cont’d.)

- (1) That the consumer has consented to receive text messages;
- (2) The identity of the sending party and/or the identity of a particular direct marketing campaign; and
- (3) How the consumer can opt-out of text message marketing and advertising.⁶

In addition, the consent should be “stored” for use in the future.⁷

For more information, we recommend companies put together a Mobile Marketing Compliance Plan, including a checklist, to ensure that text message marketing and advertising is compliant and does not run afoul of the TCPA.

For advice on the TCPA, implementation of a Mobile Marketing Compliance Plan, or application of the recent cases to specific situations, please contact one of the listed authors.

Endnotes

- 1 47 U.S.C. § 227.
- 2 47 U.S.C. § 227(a)(1) (emphasis added).
- 3 569 F.3d 946 (9th Cir. 2009).
- 4 2010 WL 963225 (N.D.Cal.)
- 5 See *Abbas v. Selling Source, LLC*, 2009 WL 4884471 (N.D. Ill. 2009) and *Lozano v. 20th Century Fox Film Corp.* --- F. Supp. 2d ---, 2010 WL 1197884 (N.D. Ill. March 23, 2010) (“[T]he plain language of the TCPA does not require Plaintiff to allege that he was charged for receipt of the text message that forms the basis for his complaint.”).
- 6 Although the cases analyzed do not specifically mention multi-media message services (“MMS”), clients wishing to advertise via MMS should follow these guidelines as well.
- 7 See also Mobile Marketing Association Consumer Best Practices Guidelines, available at: <http://www.mmaglobal.com/bestpractices.pdf> for additional guidance.

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