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LEGAL/PRIVACY

Favorable TCPA court decision for text message marketers

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There are now five major court decisions favorable for text message marketers since the Federal Communications Commission created rules in 2012 to pull text messaging under the Telephone Consumer Protection Act (TCPA) of 1991.

Most recently, on Nov. 17, California Federal Judge Manuel Real [of the United States District Court for the Central District of California] granted defendant Microsoft Corp.'s motion to dismiss the TCPA actions brought by plaintiffs Edmund Pietzak and Erin Hudson.

The plaintiffs argued that Microsoft violated the TCPA because "[i]nstead of obtaining express written consent prior to sending repeated text message solicitations, Microsoft lures potential customers to provide their mobile phone numbers in response to misleading sweepstakes and discount promotions."

Judge Real wrote: "Under the FCC's definition, it is undisputed that Plaintiffs "knowingly release[d]" their cellphone numbers to Microsoft when they participated in the promotional activities. Through such acts, Plaintiffs gave permission to be texted at that number by an automated dialing machine. Plaintiffs do not allege that Defendants, unprompted, began sending text messages directly to their mobile phones. Rather, the allegations are clear that it was Plaintiffs who initiated the receipt of text messages from Microsoft by voluntarily participating in Microsoft promotions. In doing so, Plaintiffs not only unequivocally expressed their interest in learning more about Microsoft's promotional offers, but they also provided their consent to receive that information through text messaging."

In this exclusive interview, Tim Miller, president of Sumotext Corp., offers insight into the TCPA, the FCC's subsequent rules and the effects those are now having on content providers that leverage SMS and MMS to communicate with their customers, employees and constituents.

Give us a brief recap of the TCPA as it relates to text messaging.
The Telephone Consumer Protection Act (TCPA) of 1991 basically required businesses to collect prior express written consent before making "unsolicited, automated telephone calls."

In 2012, the FCC took the position that text messages were the same as phone calls and text message broadcast systems were the same as automated telephone dialing systems (ATDS).

In effect, the FCC said text messages sent by an ATDS would be covered under the TCPA effective Oct. 16, 2013.

The FCC issued another Declaratory Ruling and Order in June that attempted to clarify some of those new rules from 2012.

How did the mobile messaging industry respond to the FCC pulling text messaging into the TCPA?
No one even talked about it during the 20 months that lead up to the effective date.

After all, "prior express written consent" had been a fundamental tenet of the messaging ecosystem since its inception.

I don't think anyone liked that the FCC unilaterally lumped our legitimate, permission-based messaging programs in with robocalls and telemarketing, and our systems certainly didn't fit the TCPA's definition of an ATDS. But we supported any effort to further protect consumer's mobile devices from spam and unsolicited marketing.

So what was the major controversy?
The commission's rules called for new disclosures with language that tied those to "prior express written consent." Some people felt those new disclosure requirements could be interpreted to invalidate existing consent agreements.

So, while most everyone simply added the new disclosures to their already "clear and conspicuous" Terms and Conditions (T&C's) and moved on, some brands panicked at the last minute and sent messages to their existing subscribers asking them to opt-in again.

It was pretty clear that some brands were missing electronic consent records to begin with, while more conservative brands wanted new consent records attached directly to the FCC's new disclosures.

What are the FCC's new disclosure requirements?
The commission wrote: "To get such consent, telemarketers must tell consumers the telemarketing will be done with autodialer equipment and that consent is not a condition of purchase." 47 C.F.R. 64.1200(a)(2), (f)(8)(i).

What did you and your clients do to comply with the FCC's new disclosure requirements?
We complied with the FCC order and updated all of our T&C's with the new, confusing language. After all, disclosures get changed all the time.

CTIA: The Wireless Association, their common short code auditors, and individual wireless carriers often require us to update the language in our calls to action, message flows and terms and conditions (T&C's) to satisfy some new best practice for consumer care. Nobody deletes their databases and starts over each time.

You don't believe the FCC's new disclosures require you to get new consent?
No. The commission emphasized in its 2012 Declaratory Ruling that the TCPA was intended to eliminate unwanted messages between the sender and a consumer, not "to disrupt communications that are expected or desired between businesses and their customers."

Every text message we send ends with "Reply STOP to opt-out." So, clearly our client's customers still want the messages they are getting.

But you did change your T&C's to admit to being a telemarketer using an autodialer?
Yes and no. Our clients updated their T&C's to include, "By signing up you agree to receive marketing text messages. We do not, but could, use an automatic telephone dialing system to deliver our text messages. Consent is not required to purchase goods or services."

This is obviously in addition to the other disclosures that have always been required and audited for both calls to action and message flows.

Have you or any of your clients ever been involved in any TCPA litigation?
No. But many of our clients have received TCPA demand letters from Joseph Manning of Manning Law in Newport Beach, CA. They claim TCPA violations and ask for $10,000 - $20,000 to avoid litigation.

None of our clients have ever paid and some clients don't even bother to respond. They've never filed an actual complaint against anyone we are aware of. They don't want anything to get adjudicated. That would end their game. They are making too much money from the demand letters.

Describe a typical Manning Law TCPA Demand Letter.
One of Manning Law's employees or attorneys will text a keyword to a short code to opt-in to one of our client's

mobile loyalty or rewards programs. Our client will reply with a compliant opt-in confirmation message that reiterates the brand's advertised call to action disclosing the program's description, frequency, rates and link to T&Cs and ending with "Reply STOP to opt-out or HELP for help + T&C's."

But instead of replying "STOP", the Manning Law employee or attorney will lie in wait a few months to receive enough of the mobile alerts they requested to send the demand letter claiming that the FCC disclosures were not provided before the prior express consent was received.

How do your clients respond to TCPA demand letters?
We just reply to their form letters with our own form letter. We quote the relevant case law and attempt to inject some common sense into the paper trail.

For example, "The case law uniformly supports our position, and you cite no contrary authority. No such contrary authority exists for good reason. Your view of the world would enable an opportunistic person to request offers from a company, and then claim damages when the exact offer requested is provided. That's the equivalent of calling a retail business, asking if they have any sales going on, and then claiming to have received an "unsolicited" telemarketing call when the business answers the inquiry. Such a result is as absurd as the claims you have made in your letters. Not surprisingly, the courts have rejected that view."

What does the recent case law look like?
There are five recent court decisions where text message marketers have prevailed over plaintiffs alleging TCPA violations.

Sadly, most of the defendants in these cases ran campaigns that are not even close to compliant under our industry's self-regulation standards administered by the CTIA on behalf of wireless carriers.

The fact that these defendants prevailed for one reason or another should only provide additional confidence for legitimate marketers operating carrier-approved SMS and MMS marketing programs over common short codes with reputable service providers using proven consent management platforms.

Satterfield v. Simon & Schuster Inc., 2014

U.S. Court of Appeals, Ninth Circuit. Case Number 07-16356

Gragg v. Orange Cab Co., 2014

Washington Western District Court. Case number 2:2012cv00576

Marks v. Crunch San Diego LLC, 2014

California Southern District Court. Case Number 3:2014cv00348

Luna v. Shac LLC, 2015

California Northern District Court. Case Number 5:2014cv00607

Pietzak/Hudson v. Microsoft Corporation and Helloworld Inc., 2015

California Central District Court. Case Number 2:2015cv05527

What are some of the reasons defendants prevail in TCPA cases despite non-compliance with industry guidelines and best practices?
Some judges have rejected the application of TCPA to a case citing no "random" or "sequential" lists of numbers were stored, produced or generated to satisfy the TCPA's original definition of an ATDS.

Some judges have rejected the application of TCPA on the basis that "human intervention" was used to get the phone numbers into the system i.e. manual entry, inbound text message request or Web form submission.

Other judgements, like Microsoft's, have simply rejected plaintiff's claims by affirming the existence of "prior express written consent" with or without the FCC's added disclosure requirements.

Give us an example of a noteworthy ruling?
The Marks v. Crunch opinion is noteworthy because the defendant prevailed in all three ways.

First, Judge Bashant relied on the Ninth Circuit's statement in Satterfield v. Simon & Schuster Inc. that the statutory definition of an ATDS is "clear and unambiguous."

Judge Bashant found that the FCC lacks the authority to change the statutory definition of an ATDS. She instead restricted the definition of an ATDS to the statutory language of the TCPA: Equipment that "has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."

Secondly, she determined that the system required and used "human intervention" to get the phone numbers in the system.

Lastly, Judge Bashant relied on the existence of consumer consent to defeat the assertion that the system "could" become an ATDS.

The Luna v. Shac opinion is also noteworthy since it came after the FCC's June 2015 Ruling and Order that retrenched the FCC's position on their new, expanded definition of an ATDS under the TCPA.

Did the FCC's June 2015 Declaratory Ruling help clear things up?
Not for the people who still question the validity of their prior consent records for recurring alert programs.

The commission's June 2015 Ruling and Order did help content providers who only respond to a customer's request with a single text message.

The commission held that this type of program was the fulfillment of a customer request to receive the responsive reply text message, not telemarketing, and therefore this type of message falls outside the scope of the TCPA.

However, the commission added, "If the business sends more than a single text as a response to the consumer, however, our rules require prior express written consent with the specified disclosures."

What is the significance of this latest Microsoft win?
Instead of parsing the TCPA and FCC rules for definitions and meanings of terms, technology and processes, Judge Real injected common sense into the topic when he wrote in his judgement: "Plaintiffs voluntarily sought specific information about Microsoft promotions, providing both their phone numbers and their express consent to receive that information by texting specific keywords from their mobile phones. There is no cognizable legal theory that could support liability against Defendants, and dismissal with prejudice is appropriate."

Do you think the November 2015 judgement for Microsoft will reduce the perceived liability risks recently associated with legitimate SMS marketing?
It probably won't stop the frivolous demand letters from plaintiff's attorneys like Manning Law who prey upon the risk-adverse culture of corporate America. But the legal precedents are piling up.

I think it's very unlikely that anyone is going to pursue litigation over the FCC's new disclosure requirements where legitimate marketers are practicing prior express written consent.

Please click here to download a PDF of the Microsoft ruling

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